

(24,412)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 270.

THE ENTERPRISE IRRIGATION DISTRICT, THE RAMS-
HORN DITCH COMPANY, ET AL., PLAINTIFFS IN
ERROR,

vs.

THE TRI-STATE LAND COMPANY AND THE FARMERS
MUTUAL CANAL COMPANY.

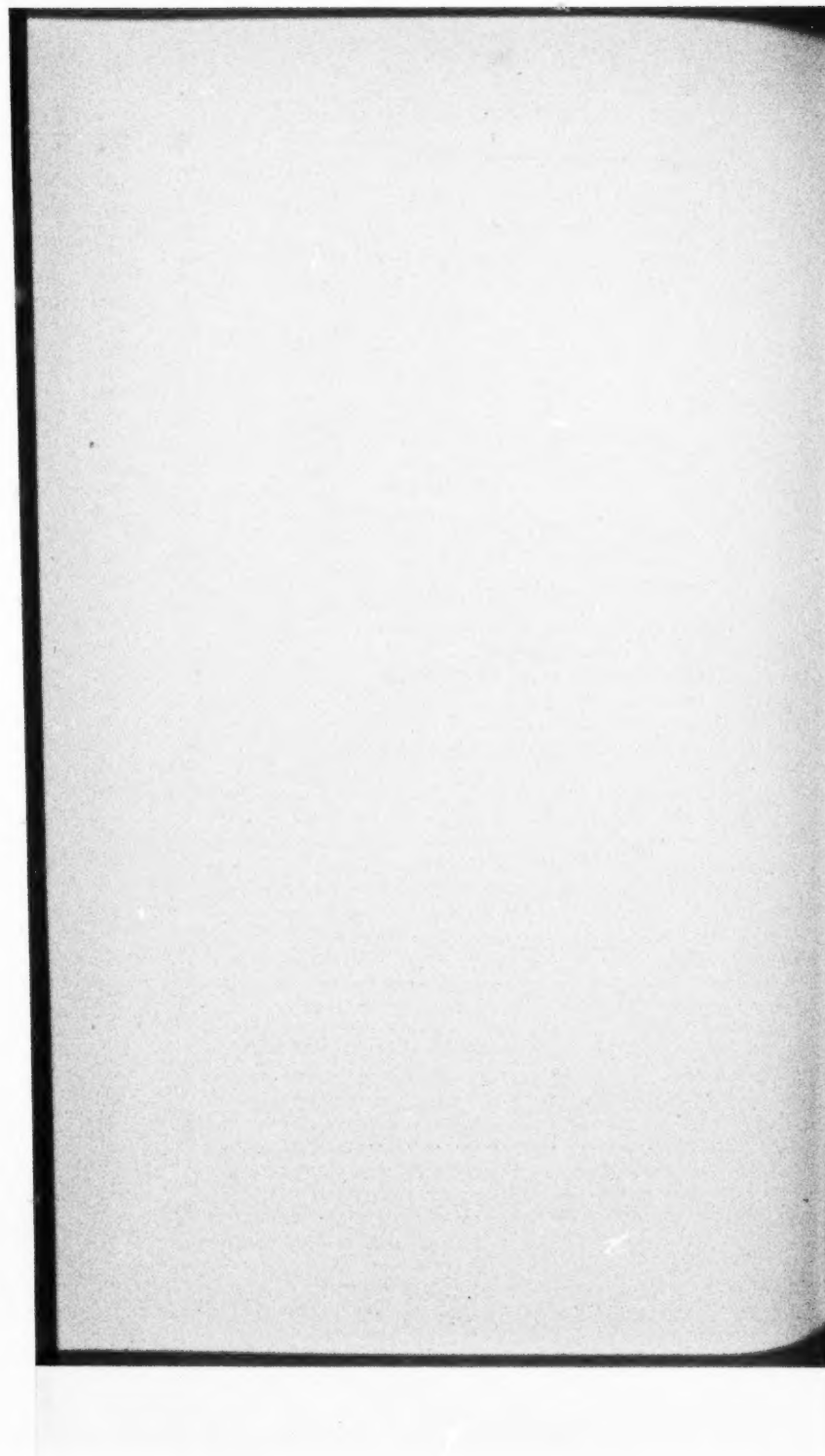
IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1 & 2

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT

v.

TRI-STATE LAND COMPANY.

Pleas Before the Supreme Court of the State of Nebraska at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 7th Day of January, 1913.

Present:

Hon. Manoah B. Reese, Chief Justice.

Hon. John B. Barnes, Judge.

Hon. Charles B. Letton, Judge.

Hon. Jacob Fawcett, Judge.

Hon. William B. Rose, Judge.

Hon. Samuel H. Sedgwick, Judge.

Hon. Francis G. Hamer, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 12th day of March, 1912, there was filed in the office of the clerk of said supreme court a certain Transcript, in the words and figures following, to-wit:

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TRANSCRIPT.

Pleas Had Before Hon. H. M. Grimes, Former Judge of the District Court in and for Scotts Bluff County, Nebraska, and Before Hon. R. W. Hobart, Judge of the 17th Judicial District in and for Scotts Bluff County, in the State of Nebraska.

In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL COMPANY, The Mitchell Irrigation District, Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, Minatare Mutual Canal & Irrigation Company, Steamboat Ditch Company, The Nine Mile Irrigation District, Alliance Irrigating Canal & Water Power Company, Chimney Rock Irrigation Canal & Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal & Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-partnership under the Firm Name of The Lucerne Land Company, Defendants.

Be it remembered, *there* heretofore, to-wit, on the 23rd day of August, 1909, a Petition was filed in the office of the clerk of the

District Court of Scotts Bluff County, (the same being omitted from this transcript) and afterwards, on the 27th day of September, 1909, an Answer and Cross Petition was filed in the office of the Clerk of the District Court by the several Cross-Petitioners, (same being omitted from this Transcript)

And afterwards on the 27th day of June 1910 an Amended Petition was filed by the Plaintiff herein in the Office of the Clerk of the District Court (same being omitted from this transcript)

And afterwards on the 11th day of July 1910 amended Cross Petitions were filed in the office of the Clerk of the District Court by the several Cross Petitioners in this cause (the same being omitted from this Transcript)

And afterwards on the 27th day of September, 1909, there was filed in the office of the Clerk of the District Court of Scotts Bluff County, Nebraska, an answer and cross-petition of The Belmont Irrigating Canal and Water Power Company in words and figures following, to-wit:

District Court, Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

VS.

TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal & Irrigation Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigation and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigating Canal and Water Power Company, and Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-partnership under the Name of Lucerne Land Company, Defendants.

Answer and Cross Petition of the Belmont Irrigating Canal and Water Power Company.

1.

Now comes the above named defendant, the Belmont Irrigating Canal and Water Power Company and answering the petition filed herein admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 13, 14, 15, 16 and 17 and also admits all allegations in paragraph- 19 and 20 as are not hereinafter denied or qualified.

2.

By way of cross-petition against the plaintiff and its co-defendants, this answering defendant alleges that on the 19th day of December, 1889, it caused a notice to be posted on the south bank of the North Platte River of its intention to appro-

priate from said stream and divert at that point through its ditch or canal as outlined on the platte hereto attached and made a part hereof, sufficient water to irrigate the land shown on said plat lying between the line of said canal and said river; caused a copy of said notice to be filed for record in the office of County Clerk in the then Cheyenne County and within the period prescribed by statute, began the construction of said canal and pushed the same rigourously, continuously and uninterruptedly until completed to the terminus designated on said plat and which was so completed in the fall of 1893; that during the years 1893 and 1894 said company constructed one hundred and ten miles of lateral and conducted water through the same to lands tributary thereto exceeding in the aggregate fifteen thousand acres; that during the succeeding years and each year thereafter, additional laterals were constructed and water conducted to other lands tributary aggregating seven thousand acres; that thereafter it released some of the land for which its appropriation had been made so that the same might be watered by lower canals and has each year added to the acreage so watered until now deducting the acreage so released and the school land belonging to the state, there is not to exceed two thousand acres to which the water has not been applied; that this defendant has at all times been willing and ready to supply water to the remaining acreage when called for; that it has done all things required of it by statute to obtain and perfect its appropriation and has and claims an appropriation sufficient to irrigate twenty-seven thousand acres or 385.7 cubic feet which has been granted it and confirmed by the State Board of Irrigation with a priority relating back to and dating from December 19th, 1889.

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3.

Further answering this cross petitioner alleges that its co-defendant, The Tri-State Land Company claims to have earned, acquired and to be entitled to, eleven hundred forty two and six sevenths cubic feet of water or a quantity sufficient to irrigate eighty thousand acres and further claims a priority relating back to August 31st, 1887, but this defendant alleges that during the low stages of the river in the months of July, August and September the flow is not sufficient to allow the different canals their full appropriation; that the asserted claim of the Tri-State Land Company would deprive this defendant of water during the low stages of the river aforesaid if the same were allowed to be exercised but this defendant alleges that its claim and priority to the appropriation above specified is unfounded because its predecessors in interests failed to comply with the law in regard to the continuous prosecution of the work thereon, but from or about the year 1893 until some time in the year 1906 it failed, ceased and neglected to do any work or construction on its said canal whereby it lost its right to the appropriation of any more water than was needed for the irrigation of the land that could have been or was supplied from its canal as constructed at the time said work ceased. That the average that could have been supplied from its said canals as con-

structed and when the work thereon ceased at or about the beginning of the year 1893 was less than two thousand acres and that as against this answering defendant it has and is entitled to a priority in sufficient water to irrigate two thousand acres and no more.

Wherefore this defendant joins the plaintiff in its prayer for relief herein, that the priority of the different appropriations of the parties hereto be marshalled, the date of the respective priorities be fixed, that the quantity of water each is entitled to be determined and their right thereto be confirmed and quieted, that its co-defendant, The Tri-State Land Company be found to have no greater priority over this answering defendant than water sufficient to water two thousand acres and that this defendant be found to have an appropriation for the quantity allowed by the State Board as hereinbefore set forth *deeding* from December 19th, 1889 and that it may have all such other and further relief as in justice it may be entitled to and to the Court shall seem meet.

THE BELMONT IRRIGATING CANAL AND
WATER POWER CO.,

By G. J. HUNT, *Its Attorney.*

STATE OF NEBRASKA,
Morrill County, ss:

G. J. Hunt being first duly sworn says he is the Attorney for the Belmont Irrigating Canal and Water Power Company the defendant answering herein; that said defendant is a corporation; that this affiant has read the foregoing answer, and the facts set forth therein are true as he verily believes.

G. J. HUNT.

Sworn to before me and subscribed in my presence this 27th day of September 1909.

[SEAL.]

MARK SPANOGLE,
Notary Public.

And afterwards on the 5th day of September, 1910, the following Journal Entry was entered upon the Journal in said cause in words and figures as follows, to-wit:

8 In the District Court of Scotts Bluff County, Nebraska.

ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

VS.

TRI-STATE LAND COMPANY et al., Defendants.

Journal.

Now on this 5th day of September, 1910, this cause came on to be heard on the demurrers of the Defendant Tri-State Land Com-

pany and The Farmers Mutual Canal Company to the amended Petition of the Plaintiff and the Amended Cross-Petition of the several Defendants to the action and the arguments of counsel of the various parties to this action and the court being fully advised in the premises doth sustain the demur-rer to the amended petition and doth sustain the demurrer filed to each of the Amended Cross Petitions, and the Plaintiff is allowed thirty days to file an Amended and Supplemental Petition and the Cross Petitioners are allowed thirty days to file Amended and Supplemental Cross Petitions.

And afterwards on the 5th day of October 1910, an Amended and Supplemental Petition was filed in the office of the Clerk of the District Court by the Enterprise Irrigation District in words and figures following to-wit:

9 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Brown Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, and Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-Partnership Under the Firm Name of The Lucerne Land Company, Defendants.

Amended and Supplemental Petition.

Comes now the aboved named plaintiff, and by leave of Court first had and obtained, files this, its amended and supplemental petition, and for and on behalf of itself and the users of water from its canal hereinafter described, complains of the defendants and each of them, and for cause of action alleges:

I.

That at all times hereinafter mentioned The Enterprise Ditch Company was a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

II.

That prior to the 28th day of March 1889 The Enterprise Ditch Company made a survey of a canal in an easterly direction from

a point on the north bank of the North Platte River about 40 rods south and 500 feet west of the northeast corner of the northeast quarter of Section 28, Township 23 North, Range 57 West of the 6th P. M., in Scotts Bluff County, Nebraska, for the irrigation of certain lands lying between said canal and said river; that on or about the 28th day of March 1889 said Company posted a notice at said point on the North bank of the North Platte River in Scotts Bluff County, Nebraska, of its intention to divert a sufficient supply of water from the North Platte River at said point to fill a ditch 30 feet wide on the bottom and 4 feet deep; said water to be conducted through said ditch in an easterly direction down the valley of the North Platte River, and used for irrigating, milling, manufacturing, domestic and other useful purposes, and on the 30th day of March 1889 said notice was filed in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in Book A of Irrigation Records at page 64.

III.

That immediately after posting said notice at said point of diversion said Company commenced the construction of said canal and prosecuted the same diligently and uninterruptedly to completion.

IV.

That thereafter said Company decided to change the point of diversion of its said canal from the North Platte River and to enlarge the same so as to carry an additional amount of water, and on the 14th day of August, 1893, it caused another notice of its intention to appropriate 13,000 inches of water, measured under a four inch pressure, in addition to that previously appropriated, to be posted at the point on the north bank of the North Platte River at which it intended thereafter to divert water from said river; which said point is located in Section 27, Township 23 north, Range 57 west of the 6th P. M., South 66 degrees 50' East 1662 feet from the northwest corner of said Section 27, and North 74 degrees 18' East 1685 feet from the original headgate of said canal. That said notice was, on or about the 18th day of August, 1893, filed in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in Volume A of Irrigation Records at page 167.

V.

That immediately after the posting of said last mentioned notice said Company commenced the construction of its headgate at the new point of diversion, and its canal therefrom, and the enlargement of the canal previously constructed, and prosecuted said work diligently and uninterruptedly to completion; that after the completion of the same and, to-wit, on or about the 20th day of April, 1895, said Company posted at the new headgate a notice of its intention to change the point of diversion of the water previously appropriated to the new

headgate, with a priority dating from the date of posting the original notice above mentioned which said notice was filed for record in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in said office on or about the 20th day of April, A. D. 1895.

VI.

That said canal was completed to its full capacity prior to the 11th day of April, 1895, towit, immediately below the headgate 6.4 feet deep, 40 feet wide on the bottom, 52.8 feet wide on the top, with a grade of 3 feet per mile; at one mile below the headgate 5 feet deep, 20 feet wide on the bottom, 30 feet wide on top, with a grade of 3 feet per mile; at 7.61 miles below the headgate 4 feet deep, 18 feet wide on the bottom, 26 feet wide on top, with a grade of 2 feet per mile; at 12.18 miles below the headgate 3 feet deep, 14 feet wide on the bottom, 20 feet wide on top with a grade of 2.11 feet per mile; at 17.72 miles below the headgate 3.3 feet deep, 10 feet wide on the bottom, 16.6 feet wide on top, with a grade of 2.11 feet per mile; at 20 miles below the headgate 2.8 feet deep, 6 feet wide on the bottom, 11.6 feet wide on top, with a grade of 2.11 feet per mile; and passing through the following described lands, to-wit: Sections 27, 22, 23, 14, 13, 24, Township 23 north, Range 57 west of the 6th P. M.; sections 19, 20, 21, 22, 27, 26, 35, 36, Township 23 north, Range 56 west of the 6th P. M.; sections 31, 32, 33, Township 23 North, Range 55 west of the 6th P. M.; sections 6, 5, 4, 9, 10, 11, 14, 13, Township 22 north, Range 54 west of the 6th P. M. That the carrying capacity of said canal at and immediately below the headgate is more than 175 cubic feet of water per second of time.

VII.

That in July, 1890, said The Enterprise Ditch Company commenced to conduct water through its said canal from the North Platte River for the irrigation of the land subject to irrigation therefrom, said land being the place of intended use of said water; that a small amount of land was irrigated from said canal during said year, and during each and every year thereafter the amount of water conducted through said canal by said company and the amount of land irrigated therefrom had been increased until the year 1895, when all the land subject to irrigation therefrom had been irrigated and reclaimed, and all of said lands have been irrigated from said canal during each and every year subsequent to the year 1895.

Said lands are described as follows:

- 90 acres in the N. W. $\frac{1}{4}$ of Section 23.
- 69 acres in the N. W. $\frac{1}{4}$ of Section 23.
- 150 acres in the N. W. $\frac{1}{4}$ of Section 24.
- 80 acres in the N. E. $\frac{1}{4}$ of Section 24.
- 80 acres in the S. E. $\frac{1}{4}$ of Section 24.

All in Township 23 north, Range 57 west.

- 123.2 acres in the N. W. $\frac{1}{4}$ of Section 19.
- 124 acres in the N. E. $\frac{1}{4}$ of Section 19.

- 13 69.5 acres in the N. W. $\frac{1}{4}$ of Section 20.
 160 acres in the S. W. $\frac{1}{4}$ of Section 20.
 142 acres in the S. E. $\frac{1}{4}$ of Section 20.
 30 acres in the N. E. $\frac{1}{4}$ of Section 29.
 36.4 acres in the S. E. $\frac{1}{4}$ of Section 29.
 77 acres in the S. W. $\frac{1}{4}$ of Section 21.
 88 acres in the S. E. $\frac{1}{4}$ of Section 21.
 80 acres in the N. W. $\frac{1}{4}$ of Section 28.
 160 acres in the N. E. $\frac{1}{4}$ of Section 28.
 93.3 acres in the S. E. $\frac{1}{4}$ of Section 28.
 9 acres in the N. W. $\frac{1}{4}$ of Section 22.
 143.2 acres in the S. W. $\frac{1}{4}$ of Section 22.
 29.3 acres in the S. E. $\frac{1}{4}$ of Section 22.
 160 acres in the N. W. $\frac{1}{4}$ of Section 27.
 137 acres in the N. E. $\frac{1}{4}$ of Section 27.
 80 acres in the S. E. $\frac{1}{4}$ of Section 27.
 5 acres in the S. E. $\frac{1}{4}$ of Section 26.
 32.5 acres in the S. W. $\frac{1}{4}$ of Section 26.
 47 acres in the N. W. $\frac{1}{4}$ of Section 35.
 100 acres in the N. E. $\frac{1}{4}$ of Section 35.
 103.5 acres in the S. E. $\frac{1}{4}$ of Section 35.
 80.9 acres in the N. W. $\frac{1}{4}$ of Section 36.
 120 acres in the S. W. $\frac{1}{4}$ of Section 36.
 57.25 acres in the N. E. $\frac{1}{4}$ of Section 36.
 160 acres in the S. E. $\frac{1}{4}$ of Section 36.

All in Township 23 north, Range 56 west.

- 64.99 acres in the S. W. $\frac{1}{4}$ of Section 31.
 30 acres in the S. E. $\frac{1}{4}$ of Section 32.

All in Township 23 north, Range 55 west.

- 14 53.35 acres in the N. W. $\frac{1}{4}$ of Section 6.
 13.8 acres in the N. E. $\frac{1}{4}$ of Section 6.
 23.9 acres in the S. E. $\frac{1}{4}$ of Section 6.
 120.35 acres in the W. $\frac{1}{2}$ of Section 5.
 94.6 acres in the N. E. $\frac{1}{4}$ of Section 5.
 160 acres in the S. E. $\frac{1}{4}$ of Section 5.
 17.5 acres in the N. W. $\frac{1}{4}$ of Section 4.
 76.7 acres in the S. W. $\frac{1}{4}$ of Section 4.
 21.1 acres in N. W. $\frac{1}{4}$ of Section 8.
 156.4 acres in the N. E. $\frac{1}{4}$ of Section 8.
 117.3 acres in the S. E. $\frac{1}{4}$ of Section 8.
 145.7 acres in the N. W. $\frac{1}{4}$ of Section 9.
 160 acres in the S. W. $\frac{1}{4}$ of Section 9.
 69.6 acres in the N. E. $\frac{1}{4}$ of Section 9.
 160 acres in the S. E. $\frac{1}{4}$ of Section 9.
 4 acres in the N. W. $\frac{1}{4}$ of Section 10.
 146.2 acres in the S. W. $\frac{1}{4}$ of Section 10.
 174 acres in the S. E. $\frac{1}{4}$ of Section 10.
 32.2 acres in the S. W. $\frac{1}{4}$ of Section 11.
 20 acres in the N. W. $\frac{1}{4}$ of Section 13.

108 acres in the S. W. $\frac{1}{4}$ of Section 13.
 104.1 acres in the S. E. $\frac{1}{4}$ of Section 13.
 159.5 acres in the N. W. $\frac{1}{4}$ of Section 14.
 160 acres in the S. W. $\frac{1}{4}$ of Section 14.
 124.9 acres in the N. E. $\frac{1}{4}$ of Section 14.
 94 acres in the S. E. $\frac{1}{4}$ of Section 14.
 160 acres in the N. W. $\frac{1}{4}$ of Section 15.
 159 acres in the S. W. $\frac{1}{4}$ of Section 15.
 160 acres in the N. E. $\frac{1}{4}$ of Section 15.
 160 acres in the S. E. $\frac{1}{4}$ of Section 15.
 160 acres in the N. W. $\frac{1}{4}$ of Section 16.
 69.3 acres in the S. W. $\frac{1}{4}$ of Section 16.
 160 acres in the N. E. $\frac{1}{4}$ of Section 16.
 122.4 acres in the S. E. $\frac{1}{4}$ of Section 16.
 127 acres in the N. E. $\frac{1}{4}$ of Section 17.
 41 acres in the N. W. $\frac{1}{4}$ of Section 22.
 55 acres in the N. E. $\frac{1}{4}$ of Section 22.
 53 acres in the N. W. $\frac{1}{4}$ of Section 23.
 12 acres in the N. W. $\frac{1}{4}$ of Section 24.
 69.1 acres in the N. E. $\frac{1}{4}$ of Section 24.

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All in Township 22 north, Range 55 west.

34.4 acres in the S. W. $\frac{1}{4}$ of Section 8.
 150.9 acres in the N. W. $\frac{1}{4}$ of Section 17.
 95 acres in the S. W. $\frac{1}{4}$ of Section 17.
 79.3 acres in the N. W. $\frac{1}{4}$ of Section 18.
 148 acres in the S. E. $\frac{1}{4}$ of Section 18.
 97.5 acres in the S. W. $\frac{1}{4}$ of Section 18.
 72 acres in the N. W. $\frac{1}{4}$ of Section 19.
 140 acres in the N. E. $\frac{1}{4}$ of Section 19.

All in Township 22 north, Range 54 west.

Said lands being all located between the North Platte River and the canal of the plaintiff, and between the Winters Creek Ditch and the canal of the plaintiff, in Scotts Bluff County, Nebraska, and requiring 173-5 cubic feet of water per second of time for the irrigation of the same.

VIII.

That on the 27th day of June, 1898, plaintiff, The Enterprise Irrigation District, was organized under the provisions of an Act of the Legislature of the State of Nebraska entitled "An Act to provide for the organization and government of irrigation districts and to provide for the acquiring of canals already built or partly constructed, for the acquiring of the right of way to build irrigation ditches or canals and other property, for the dividing of certain portions of the territory of the State of Nebraska into irrigation districts and for said irrigation districts to vote bonds for the purpose of construction irrigation canals, for the purpose of buying and purchasing by said irrigation districts irrigation canals already con-

16 structed or partially constructed, and the paying for the same, providing for a system of revenue to be raised by taxation upon the property in said irrigating districts, to pay the interest and principal of said bonds, and the manner in which the same shall be done, the holding of elections in said districts, for the purpose of electing officers and providing for the management of said districts, also providing for the increase and enlargement of said districts whenever it may become necessary or best to increase their size." Approved March 26, 1895.

That said district embraced and included therein, and still embraces and includes all of the above described lands, and ever since said time has been and now is a corporation duly organized and existing under and by virtue of the provisions of said act of the Legislature of the State of Nebraska.

IX.

That on the 17th day of March, 1900, The Enterprise Ditch Company above mentioned sold and conveyed to The Enterprise Irrigation District, plaintiff herein, its said canal above described and all the water rights, franchise, privileges, immunities and property of every nature and description theretofore acquired by it, and ever since said time said The Enterprise Irrigation District has been and now is the owner of the same, and as such owner, is required to conduct water through said canal, during each and every irrigation season for the irrigation of the above described lands, which require at least 173 5/7 cubic feet of water per second of time constantly flowing during each and every irrigation season for the proper irrigation of the same.

X.

That by virtue of the performance of the acts above enumerated by said The Enterprise Ditch Company and its grantee, the plaintiff herein, said plaintiff and the owners of lands subject to irrigation from its canal have acquired and now own the right to appropriate and divert from the North Platte River a sufficient quantity
17 of water for the irrigation of the above described lands, to-wit, 173-5/7 cubic feet of water per second of time, continually flowing during each and every irrigation season, with a priority dating from the date of posting the notice above mentioned, to-wit, the 28th day of March, 1889.

XI.

Plaintiff further avers that on or about the twenty-eighth day of May 1895, the County Clerk of Scotts Bluff County, Nebraska made a transcript of the above mentioned notices and transferred the same to the office of the Secretary of the State Board of Irrigation of the state of Nebraska, and said transcript of said notices was filed by the said Secretary of the State Board of Irrigation in his office on the thirty-first day of May 1895; that thereafter the Secretary of the State Board of Irrigation forwarded to The Enterprise Ditch Com-

pany a blank "Claim for the Waters of the State of Nebraska" to be filled out giving the information therein required regarding the claim of said Company to the use of water from the North Platte River; that said blank was filled out by one Ed. Scriven, who was at that time Secretary of said The Enterprise Ditch Company, and was returned by him to the office of the Secretary of the State Board of Irrigation and filed in said office on the 15th day of October 1895; that on or about the 17th day of July 1896 the Secretary of the State Board of Irrigation made certain inquiries and took certain evidence, regarding the claim of said The Enterprise Ditch Company; that on the 7th day of January, 1897, the said Secretary of the State Board of Irrigation rendered an opinion on said claim, and made the same a matter of record in his office, in which opinion said Secretary found and determinde that said The Enterprise Ditch Company had constructed a ditch or canal as stated in this petition; that said ditch or canal covers and re-claims the lands herein described; and that the priority of the appropriation of said The Enterprise Ditch Company dated from the twenty-eighth day of March 1889.

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XII.

Plaintiff further avers that said opinion of the Secretary of the State Board of Irrigation contained no finding whatever regarding any other appropriation or claims for the use of water from said stream, nor did said opinion determine or find that any other person, company, corporation or party was entitled to appropriate any water whatever from said stream either prior or subsequent to said The Enterprise Ditch Company; nor did said opinion contain any finding whatsoever as to the relative priorities of the various appropriators of water from said stream; that said The Enterprise Ditch Company had no notice that any person, company or corporation claimed the right to appropriate water from said stream prior to that of said The Enterprise Ditch Company.

XIII.

Plaintiff further avers on information and belief that several other claimants for the use of water from the North Platte River had prior to the 7th day of April 1897 filed with the Secretary of the State Board of Irrigation of the State of Nebraska their respective claims for the use of water from the North Platte River; that the Secretary of the State Board of Irrigation after making such ex parte inquiry and taking such evidence ex parte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims; that no claimant for water from said river had any notice whatever of the claims for water filed by others, nor had any claimant for water from said river any notice of the opinions of the Secretary on the other claims for water from said river; that on the 7th day of April 1897, the State Board of Irrigation, without any notice to the claimants of appropriations of water, or any of them, and without the knowledge of the plaintiff or its grantor,

caused a resolution to be entered on its records affirming all
19 opinions rendered by the said Secretary of the State Board
of Irrigation prior to that date, including the opinion rendered on the claim of The Enterprise Ditch Company.

XIV.

Plaintiff further avers that neither The Enterprise Ditch Company, nor its grantee, the plaintiff herein, had any notice, knowledge or information concerning the various opinions rendered by the said Secretary of the State Board of Irrigation, prior to the 7th day of April 1897, on the claims of others for rights to the use of water from the North Platte River, or any of them, or of the passage of the above mentioned resolution affirming said opinions and neither the plaintiff nor its grantor acquired any knowledge of said action for several years thereafter, nor until shortly prior to the commencement of this action, and neither the plaintiff nor its grantor had any notice or information that the State Board of Irrigation ever intended to do anything more than make a record of the claim of The Enterprise Ditch Company in its office.

XV.

Plaintiff further avers that during each and every month of each and every irrigation season, with the exception of one or two weeks during the extremely low water of some seasons, there has been a sufficient quantity of water flowing down the channel of said river to the headgate of the canal of this plaintiff to supply a sufficient quantity of water to be diverted into said canal to irrigate all of said lands.

That prior to the time said lands were irrigated they were, on account of insufficient moisture and rain fall, desert in character and incapable of producing crops, but since irrigating the same they have become very productive and valuable, and have been brought to a high state of cultivation; that since the application of water to said lands, through and by means of said canal, they have
20 been used in raising various kinds of vegetables, grains, hay and other crops adapted to the climatic conditions of the country; that some of said lands have been planted to alfalfa and some to shrubbery, trees and orchards, which are all in a good flourishing conditions, owing to the fact that they have been irrigated, and it is absolutely necessary to continue to irrigate the same during the various months of the irrigation seasons of each year, in order to preserve said crops, tree, shrubbery and orchards from ruin and destruction, that without irrigation said lands would become practically valueless and the prosperous homes now located thereon would be destroyed and ruined.

XVI.

Plaintiff further avers that on or about the 31st day of August 1887 a corporation known as The Farmers Canal Company was

organized and incorporated under the laws of the State of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of the said state. That in the Spring of 1889 said The Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte River at a point on said river, in Scotts Bluff County, Nebraska, where the West line of Section 10, Township 23 north, Range 58 west, intersects the north bank thereof, for irrigation purposes. That said point of diversion of the canal of said The Farmers Canal Company is about six miles up the river from the headgate of the canal of this plaintiff. That said The Farmers Canal Company continued work on said canal until sometime in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said Company ceased work thereon. That at said time there was not more than 1,500 acres of land susceptible of irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 1,000 to

1,200 acres of land. That said Company did not again resume work on said canal until the Spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until sometime in the Summer of 1893, when it again ceased work on said canal. That when said company ceased work on said canal in 1893 it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about 2,500 to 3,000 acres of land. That as completed in 1893 there were not more than 2,000 acres of land susceptible of irrigation from said canal, and said company and its grantees never irrigated more than 2,000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than said 2,000 acres of land. That on or about the 23rd day of December 1901 said canal of The Farmers Canal Company, together with all its property, rights and franchises, was sold under a decree of foreclosure to one Robert Walker, who, on or about the 20th day of October 1904, sold and conveyed the same to The Tri-State Land Company, one of the defendants above named, which is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

XVII.

That no further work was done on said canal from the time that The Farmers Canal Company ceased work thereon in the year 1893 until the defendant, The Tri-State Land Company, commenced to enlarge and extend the same in September 1906. That said defendant The Tri-State Land Company prosecuted work thereon from September 1906 until the Fall of 1907, and did enlarge said canal at the headgate and for some distance below the headgate to a width of 90 feet at the bottom and a depth of 11 feet, and did extend the same in an Easterly direction for a distance of about 40 miles from

the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land.

22 That prior to the commencement of this action said The Tri-State Land Company entered into a contract with the Farmers Mutual Canal Company, a corporation organized under the laws of the State of Nebraska, whereby said Tri-State Land Company agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal, water rights, appropriations and franchises of said The Tri-State Land Company, and plaintiff is informed and believes and on such information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal together with all water rights, appropriations and franchises acquired by it to said The Mutual Farmers Canal Company receiving in payment therefor all of the capital stock of the Mutual Farmers Canal Company a majority of which said capital stock said Tri-State Land Company still owns and controls. That Tri-State Land Company and said Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 or 40 miles so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said Companies intend to divert and appropriate water through said canal from the North Platte River, which is the only source of supply of the canal of the plaintiff herein.

XVIII.

Plaintiff further avers on information and belief that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation of the state of Nebraska made certain inquiries and took certain evidence regarding the right of the Farmers Canal Company to appropriate water from the North Platte River; that thereafter and on or about the 19th day of September 1896 said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska its claim for an appropriation of water from the North Platte River to the extent of 275,000 minors' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres; that thereafter and on or about the 9th day of January 1897, the Secretary of the State Board of Irrigation

23 did render an opinion on said claim and make the same a matter of record in his office, in which opinion he, the said Secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte River in the southwest quarter of the southeast quarter of section three, township twenty-three north, range fifty-eight west; that said ditch is about eighty-one miles in length; that said ditch or canal covers and re-claims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dated from the 16th day of September 1887. Said opinion further stated that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

"1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd. The amount of the appropriation shall not exceed eleven hundred and forty-two and six sevenths ($1142\frac{6}{7}$) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth ($1/70$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

But said opinion contained no finding whatever as to relative priorities of the various appropriators of water from said stream.

XIX.

Plaintiff further avers on information and belief that on the 7th day of April 1897, the State Board of Irrigation caused a resolution to be entered on its records affirming the opinion of the Secretary of the State Board of Irrigation on the claim of the Farmers Canal Company above mentioned, and other opinions rendered by said secretary prior to said date.

XX.

Plaintiff further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the said State Board of Irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty-miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land, nor any part thereof, except about two thousand acres; that at said time said company had not acquired a right to appropriate $1142\frac{6}{7}$ cubic feet of water per second of time from said river nor any part thereof, except about twenty-eight cubic feet of water per second of time; and said opinion and said resolution are erroneous and false in said particulars.

XXI.

Plaintiff further avers that neither The Enterprise Ditch Company nor its grantee, the plaintiff herein, had any notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon, or inquiry with reference thereto, or of the opinion of the Secretary of the State Board of Irrigation thereon, or of the resolution entered upon the records of said Board affirming said opinion; nor did the plaintiff herein or its grantors acquire any knowledge whatever of the above mentioned transaction of said Board and its Secretary for several years after they had taken place; that no copy of said opinion and resolution, or either of them, was

ever at any time delivered to the plaintiff herein or to its grantor, or filed in the office of the County Clerk of Scotts Bluff County, Nebraska; nor was any certificate signed by the president or said State Board and attempted by the Secretary, or otherwise, containing the name of the post-office address of said Company or the priority of its appropriation, or the amount of water appropriated by it, or the amount of prior appropriations of any other information with reference to said claim of said The Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska, or to the County Clerk of any other county in said state, nor was any such certificate with reference to the appropriation of the plaintiff herein ever transmitted to the County Clerk of said County or the County Clerk of any other County. That neither the plaintiff herein nor its grantor was given opportunity whatever of appearing before the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference to said claim of The Farmers Canal Company, and said opinion and resolution are therefore absolutely null and void.

XXII.

Plaintiff further avers that neither The Farmers Canal Company nor its grantees, nor either of them, ever appropriated or applied to a beneficial use, prior to the year 1909, more than twenty-eight cubic feet of water per second of time, yet notwithstanding this fact, The Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired through and under the Farmers Canal Company, a right to appropriate from the North Platte River 1142 6/7 cubic feet of water per second of time with a priority dating from the 16th day of September 1887 and said Companies have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte River to the extent of 1142-6/7 cubic feet per second of time, continually flowing during the irrigation season of each and every year which is prior to the right of appropriation acquired by this plaintiff and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the canal of the plaintiff herein for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river.

XIII.

Plaintiff further avers that during the greater portion of the irrigation season of 1910 said The Tri-State Land Company and the Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of twenty-eight cubic feet of water per second of time, and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of the plaintiff much below the quantity of water to which

the plaintiff herein was entitled to divert from said river; that notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said Board and notwithstanding the fact that no adjudication was in fact made by said Board of the relative rights of the plaintiff and the other parties to this action, yet because of the rendering of the opinion above mentioned by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation refused to limit or restrict said Farmers Mutual Canal Company and the Tri-State Land Company, or either of them, in the diversion of water from said stream to twenty-eight cubic feet of water per second of time, or to any quantity less than 1142 $\frac{6}{7}$ second feet, but on the contrary said State Board of Irrigation caused the headgate of the plaintiff herein to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed The Farmers Mutual Canal Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of 1142 $\frac{6}{7}$ cubic feet of water per second of time; that during all of the time that the headgate of the canal of the plaintiff herein was closed by the State Board of Irrigation as aforesaid, said Farmers Mutual Canal Company and Tri-State Land Company were diverting several hundred cubic feet of water per second of time from said river, which included 173- $\frac{5}{7}$ cubic feet of water per second of time which the plaintiff herein was entitled to have flow into and through its said canal for the irrigation of land subject to irrigation therefrom.

XXIV.

Plaintiff further avers that to give the Farmers Mutual Canal Company or its grantors a priority over the plaintiff herein to the use of water to the extent of 1142- $\frac{6}{7}$ cubic feet of water per second of time would be to deprive the plaintiff herein and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution above referred to constitute a cloud on plaintiff's title to an appropriation of water from said stream and unless said cloud is cleared by a decree of this Court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant the plaintiff herein or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of said stream by The Farmers Mutual Canal Company and The Tri-State Land Company, and will permit said companies to divert all of the water of said stream during times of scarcity to the entire exclusion of the plaintiff and the users of water from its canal.

XXV.

Plaintiff further avers that the North Platte River derives its supply of water from various streams heading in the mountains

28 of Colorado and Wyoming, and that the amount of water flowing therein varies greatly at different times in the year. That during the months of April, May and June the amount of water usually flowing in said river is sufficient to supply all the canals thus far constructed for the purpose of diverting water therefrom. That during July and August of each year the amount of water flowing in said river at or near the headgates of the canal of the plaintiff and that of said defendants, The Farmers Mutual Canal Company and the Tri-State Land Company, ranges from 100 to 2000 cubic feet per second of time, and the average flow during said time is about 875 cubic feet per second of time. That during September and October of each year the flow of water in said river at or near the headgates of the plaintiff's canal and that of the said defendant's ranges from 50 to 2000 cubic feet per second of time, and the average flow of said stream during said months is about 452 cubic feet per second of time. That during November of each year the flow of water in said river at or near the headgates of the canal of the plaintiff and that of said defendants ranges from 250 to 2000 cubic feet per second of time, and the average flow of said river during said month is about 908 cubic feet per second of time.

That the average flow of water through said river at or near the headgates of the canal of the plaintiff and that of said defendants during the months of July, August, September, October and November has been for several years last past, and will be in the future much less than the amount of water which said defendants claim a right to divert and appropriate from said river prior to that of plaintiff, and if said Company be permitted to divert 1142-6/7 cubic feet of water per second of time prior to the plaintiff herein, the said plaintiff and the users of water from its said canal will be wholly deprived of the use of water for irrigation purposes during the months of July, August, September, October, and November

29 of each and every year, to the irreparable damage and injury of the plaintiff herein and the users of water from its said canal.

XXVI.

Plaintiff further avers that the claim of the Tri-State Land Company and The Farmers Mutual Canal Company to a right to appropriate 1142-6-7 cubic feet of water per second of time from the North Platte River during each and every irrigation season with a priority dating from the 16th day of September, 1887, is unfounded in truth and fact; that neither said The Farmers Mutual Canal Company nor its grantors, nor either of them, ever acquired a right to appropriate from said river any amount of water whatsoever except a sufficient amount to irrigate about 2000 acres of land, or 28 cubic feet of water per second of time, continually flowing during each irrigation season. That all rights of appropriation acquired by said The Farmers Mutual Canal Company and its grantors to appropriate water from the North Platte River, if any rights were acquired by them, or either of them, are subsequent, junior and inferior to the right of appropriation acquired by the plaintiff herein.

That if said The Tri-State Land Company and the Farmers Mutual Canal Company ever did, by virtue of any proceedings taken by said companies or their grantors, or either of them, or otherwise, initiate a right of appropriation which upon application to a beneficial use would ripen into a right to appropriate waters from said river, said rights so initiated if any, have become lost to said Companies and their grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged right, if any such was in any manner initiated or acquired by said Companies or their grantors. That notwithstanding the fact that the claim of the Tri-State Land Company and The Farmers Mutual Canal Company to an appropriation of 1142 6/7 cubic feet per second of time during each and every irrigation season,

with a priority dating from the 16th day of September 1887,
 30 is unfounded in truth and in fact and that the rights acquired by said companies and their grantors are subsequent, junior and inferior to the right of appropriation of water from said river acquired by the plaintiff herein, said companies will, unless restrained by an order or decree of this court, construct a dam across said river at the headgate of said canal, and will divert into said canal, during each irrigation season, all of the water flowing in said river to the extent of 1142-6/7 cubic feet per second of time. That during the greater portion of each and every irrigation season there is less than 1142-6/7 cubic feet of water per second of time flowing in, said river, and during all of the time that there is less water flowing in said river than the 1142 6/7 second feet claimed by said Tri-State Land Company and said The Farmers Mutual Canal Company and in addition thereto 173-5/7 second feet claimed by plaintiff herein, said defendants will take and divert from said river water which the plaintiff herein is entitled to have flow into its canal, and will, during the greater portion of each irrigation season, take and divert from said river all the water flowing therein and thus prevent the plaintiff herein from diverting any water from said river into its canal, to the irreparable damage and injury of the plaintiff, and the users of water from its canal.

XXVII.

Plaintiff further avers that The Mitchell Irrigation District is a corporation organized and existing under and by virtue of the laws of the State of Nebraska; that said District is the owner of a canal with a headgate on the south bank of said river about one-half mile up said river from the headgate of the canal of the Farmers Mutual Canal Company and the Tri-State Land Company, through which said canal said The Mitchell Irrigation District and its grantors have been for several years last past diverting and appropriating large quantities of water from said river for the irrigation of lands located in said district in Scotts Bluff County,
 31 Nebraska, and said District claims a right of appropriation of water from said river prior to that of The Farmers Mutual Canal Company and The Tri-State Land Company.

That the Gering Irrigation District is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, and is the owner of a canal with a headgate on the south bank of said river directly opposite the headgate of the canal of The Farmers Mutual Canal Company and The Tri-State Land Company, through which said canal said The Gering Irrigation District has been for several years last past diverting and appropriating water from said river for the irrigation of lands located in said District in Scotts Bluff County, Nebraska, and said The Gering Irrigation District claims a right of appropriation of water from said river prior to that of the Farmers Mutual Canal Company and the Tri-State Land Company.

That the Ramshorn Ditch Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska, and is the owner of a canal with a headgate on the North bank of the North Platte River about three miles down the river from the headgate of the canal of The Farmers Mutual Canal Company and the Tri-State Land Company, and about three miles up the river from the headgate of the canal of the plaintiff herein, through which said canal said The Ramshorn Ditch Company has been for several years last past diverting and appropriating water from said river for the irrigation of lands in Scottsbluff County, Nebraska, and said The Ramshorn Ditch Company claims a right of appropriation of waters from said river prior to that of The Farmers Mutual Canal Company and the Tri-State Land Company.

Plaintiff further avers that the rights acquired by said defendants and each of them are subsequent, junior and inferior to the rights acquired by the plaintiff herein to an appropriation of waters

32 from said river.

XXVIII.

Plaintiff further avers that The Winters Creek Irrigation Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Central Irrigation District is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Castle Rock Irrigation Canal and Water Power Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Minatare Mutual Canal and Irrigating Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Steamboat Ditch Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Nine Mile Irrigation Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Browns Creek Canal and Water Power Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Chimney Rock Irrigation Canal and Water Power Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That the Browns Creek Irrigation Company is a corporation organized and existing under

and by virtue of the laws of the State of Nebraska. That the Belmont Irrigation Canal and Water Power Company is a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

That all of the above mentioned corporations and the defendant Charles E. Logan are owners of canals through which they have been diverting and appropriating water from said North Platte River for irrigation purposes, with headgates located in said river below the headgate of plaintiff herein, in Scotsbluff and Morrill Counties, Nebraska, and they and each of them claim to have acquired a right to appropriate waters from said river; but plaintiff

is unable to state the respective quantities of water which said parties have acquired a right to appropriate from said river, or the respective dates of priority of the same; but some of said defendants are claiming rights prior to the right of appropriation acquired by the plaintiff herein.

That Thomas W. Wheeler, Charles A. Sweet and William E. Guthrie are a co-partnership doing business under the firm name of The Lucerne Land Company and as such claim some interest in the canal of the Belmont Irrigation Canal and Water Power Company, the exact nature of which is unknown to this plaintiff.

XXIX.

Plaintiff further avers that if it should be adjudged that The Farmers Mutual Canal Company and The Tri-State Land Company or either of them has a right of appropriation prior to that of The Mitchell Irrigation District, The Gering Irrigation District and The Ramshorn Ditch Company, or either of them, and said The Farmers Mutual Canal Company and The Tri-State Land Company should be permitted to divert the entire flow of water of said river as against said defendants or either of them, and should be enjoined and restrained from diverting from said river the quantity of water which plaintiff herein has acquired a right to appropriate from said river, then and in that event, said defendants The Mitchell Irrigation District, The Gering Irrigation District, and the Ramshorn Ditch Company will divert and appropriate from said river the water to which plaintiff has acquired a right of appropriation, unless enjoined and restrained by an order or decree of this court.

XXX.

That in order to determine how much water the defendants, The Farmers Mutual Canal Company, The Tri-State Land Company, The Mitchell Irrigation District, The Gering Irrigation District, and The Ramshorn Ditch Company, should permit to flow down the channel of said river to the headgate of the canal of the plaintiff herein, it will be necessary to determine the quantity of water, if any, that this plaintiff may be compelled to permit to flow down the channel of said river to the headgates of the canals of the other defendants herein, and for that reason the plain-

tiff has made said defendants parties to this action, in order that the relative rights of appropriation of water from said river of all of said parties may be judicially determined in one action, and thus prevent a multiplicity of suits.

Wherefore Plaintiff Prays:

1. That a decree be entered herein determining and adjudicating the respective amount of water that the respective parties to this action have acquired a right to appropriate from said river and the relative priorities of said rights of appropriation.

2. That it be adjudged and decreed that the plaintiff herein has acquired a right of appropriation of water from the North Platte River to the extent of 173-5/7 cubic feet per second of time, continually flowing during each and every irrigation season, with a priority dating from the 28th day of March 1889, and that said right is prior in time and prior in right to the rights of appropriation of the defendants and each of them, and that the title to said right of appropriation of plaintiff be quieted and confirmed in the plaintiff as against the defendants and each of them, and that the cloud cast on plaintiff's title by reason of the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board, confirming said opinion be removed.

3. That the defendants, The Farmers Mutual Canal Company, The Tri-State Land Company, The Ramshorn Ditch Company, the Mitchell Irrigation District, and the Gering Irrigation District and each of them, be enjoined and restrained from decreasing or diminishing the flow of water in said river at the headgate
35 of the canal of the plaintiff herein below the amount of water which said plaintiff has acquired a right to appropriate, to-wit 173-5/7 cubic feet of water per second of time, continually flowing during each and every irrigation season, and the amount of water, if any, which it may be adjudged and decreed that the plaintiff herein shall permit to flow down the channel of said river past its headgate..

4. That the plaintiff herein be granted such other and further relief as may be just and equitable.

5. That the plaintiff have and recover judgment against the defendants for the costs of this action.

THE ENTERPRISE IRRIGATION DISTRICT.
By MORROW & MORROW,

Attorneys for Plaintiff.

STATE OF NEBRASKA,
County of Scottsbluff, ss.:

Wm. M. Barbour, being first duly sworn, deposes and says that he is Secretary of The Enterprise Irrigation District; the plaintiff herein; that he has read the foregoing petition and knows the contents thereof, and that the facts therein stated are true as he verily believes.

W. M. BARBOUR.

Subscribed in my presence and sworn to before me this Fourth day of October 1910.

My commission expires Dec. 6th, 1915.

[SEAL.]

GRACE E. BROWN,
Notary Public.

36 And afterwards, on the 6th day of October, 1910 there was filed in the office of said Clerk an amended answer and cross petition of The Alliance Irrigating Canal and Water Power Company in the words and figures following, to wit:

District Court, Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL COMPANY, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigation Company, The Steamboat Ditch Company, The Nine-Mile Irrigation District, The Alliance Irrigation Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles F. Logan, The Belmont Irrigation Canal and Water Power Company, Defendants.

Amended Answer and Cross Petition of The Alliance Irrigating Canal and Water Power Company.

Now comes the Alliance Irrigating Canal and Water Power Company, one of the defendants named in the above entitled cause, and for answer and cross petition herein;

1. Admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 8, 11, 12, 13, 14, 15, and 16 of plaintiff's amended petition filed herein and admits all such other allegations therein contained as are affirmatively set forth in the cross petition of this defendant herein and denies each and singularly all other allegations in said petition contained that are not affirmatively admitted or qualified herein.

For cross petition against the plaintiff herein and each of its co-defendants, this defendant shows unto the Court and alleges:

1.

That on the 26th day of December, 1892, it caused a notice of appropriation of water to be posted on the north bank of the North Platte river in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 5. Twp. 37 20 N., Rg. 53 west of the 6th P. M. at the proposed point of diversion through its canal to be constructed as outlined on the plat hereto attached and made a part hereof, and thereafter and on the 31st day of December, 1892, it caused a copy of said notice to

be filed for record in the office of the County Clerk of the then Cheyenne County, setting forth its intention to appropriate from said stream and divert at the point where said notice was posted through its ditch or canal as outlined on said plat, sufficient water to irrigate the land lying between said canal and the river, and more particularly described as all that portion of Sections 4, 3, 2, 1, 12, 13, 11 and 10, Twp. 20, Range 52, as lies between the line of its said canal and the river and such portions of Sections 35 and 36, Twp. 21, Range 52, as lies south of the line of its said canal, and so much of sections 6, 8, 9, 10, 11, 1, 12, 13, 16, 17, 18, Twp. 20, Range 51, west as lies between the line of this said canal and the river together with all of section 7, said Twp. 20, Range 51, as will more fully appear from the map of the same hereto attached. That within the period prescribed by statute it began the construction of said canal and pushed the same vigorously, continuously and uninterruptedly until completed; that contemporaneously with the construction of said canal many laterals were built therefrom to carry water to the land as hereinabove described to be supplied thereby, and immediately after the completion of said canal other laterals were built to carry water to the acreage so to be supplied and water was thereafter carried from said canal and conducted through said laterals to all the land described on said plat except some school land thereunder belonging to the state and that by reason and by virtue of the premises this defendant perfected its right to, acquired, and under the law then in force became entitled to an appropriation of water in the amount claimed by it sufficient to water the area so described, to-wit,

38 100 cubic feet per second of time with priority relating back to and dating from the said 26th day of December, 1892.

2.

That thereafter and in the year 1895 the legislature of the State of Nebraska amended the law applicable to the appropriation of water for irrigation purposes by the passage of the act comprising chapter 69 of the Laws of 1895 at page 246 entitled "An Act prescribing the regulation for the appropriation, distributing, and use of water" &c. &c. which act provided among other things for ascertaining the appropriations already made, measuring the stream from which such appropriations had been made and marshalling the priority of such appropriations by date thereof as the same might appear of record in the office of the county clerk of the respective counties in which such appropriations had been made. That pursuant to said act, and in compliance with the request of the State Board of Irrigation thereby created and by said act instructed so to proceed, the County Clerk of Cheyenne County, made a transcript so filed by this defendant and transmitted the same to the Secretary of the State Board of Irrigation of the State of Nebraska, some time prior to the 14th day of July, 1895; that thereafter the Secretary of said Board forwarded to the Alliance Irrigation Canal and Water Power Company a blank form to be filled entitled, "Claim for the Waters of the State of Nebraska", requesting by the filling of such blank certain information in regard to this defendant's claim for the

use of water from the North Platte river; that this defendant caused said blank to be filled out with the facts regarding the appropriation of water and the construction of the canal by it, and forwarded the same to the Secretary of said State Board of Irrigation; that thereafter, along or about the 14th day of July 1896, the Secretary of the State Board of Irrigation made certain inquiries and claims to have taken certain evidence regarding the facts set forth by
39 this defendant in filling out the blank above referred to, and that long subsequent thereto; the exact date of which this defendant is not advised the Secretary of the State Board of Irrigation formulated an opinion upon the statement submitted by this defendant as to the claim to an appropriation and the construction of its canal, and made the same a matter of record in his office; which said opinion reiterated the fact that this defendant had constructed its canal as hereinbefore alleged, had posted the notice upon the bank of the river at the point of diversion as hereinbefore set forth, had filed with the County Clerk of Cheyenne County a copy of the notice of appropriation to be therein by him recorded, and was entitled to appropriate from said stream 100 cubic feet of water per second of time for the irrigation of the land hereinabove described, and with priority dating from the 26th day of December, 1892.

3.

Plaintiff further avers that the opinion of the said Secretary of the State Board of Irrigation contain- no reference to any other appropriation of water from said stream prior to that of this defendant, The Alliance Irrigating Canal and Water Power Company nor did said opinion undertake to find or determine that any other person, company or corporation had appropriated or was entitled to appropriate any water whatever from said stream prior to the appropriation of this defendant; nor did said opinion contain any finding whatever as to the relative priorities of different appropriators therefrom, nor had this defendant any notice that any other person, company or corporation claimed the right to appropriate water from said stream prior to the appropriation of this defendant.

4.

Further answering this defendant shows to the court that various other claimants to water appropriated from said stream filled out similar blanks to the one hereinbefore described and forwarded the same to the Secretary of the said State Board of Irrigation at or
40 about the time this defendant did the same and that the said Secretary of the State Board aforesaid making such ex parte inquiry and taking such testimony as he deemed necessary and advisable in reference to each particular statement submitted, rendered a separate opinion on each so-called "Claim" that no "Claimant" for water so appropriated had any notice whatever of the other claim filed nor had any so-called claimant for water from said river, any notice of the opinions of the Secretary rendered on the other claims for water on said stream. That this defendant, the Alliance Irrigating Canal and Water Power Company had no notice, knowledge or information

concerning the various opinions rendered by the said Secretary of the State Board of Irrigation on other claims for a right to the use of water from the North Platte River until long after the same had been made a matter of record in his office.

That on the 7th day of April, 1897, the said State Board of Irrigation, without any notice to claimants who had previously made and perfected their right to the appropriation of water from said stream, or any of them, and without the knowledge of this defendant caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of the State Board prior to that date including the opinion rendered on the so-called claim of the Alliance Irrigating Canal & Power Company and that this defendant had no notice, knowledge or information of any such action for several years thereafter nor until shortly prior to the commencement of this suit.

5.

Further answering this cross petitioner alleges that its codefendant, the Tri-State Land Company, claims to have earned acquired and to be entitled to an appropriation of 1142.6 cubic feet of water per second of time or a quantity sufficient to irrigate 80,000 acres of land and further claims a priority of appropriation dating from August 31, 1887, and bases its claim not upon compliance with the law in

41 force at the date of posting its notice upon the bank of the river at the proposed point of diversion but solely upon an alleged finding and adjudication of the said State Board of Irrigation and its Secretary. And this defendant alleges on information and belief that the Farmers Canal Company a corporation, whose interest its codefendant, the Tri-State Land Company claims to have acquired, filled out and filed with the Secretary of State Board a blank entitled Claim for the Waters of the State of Nebraska, as hereinabove described and that thereafter and on or about the 17th day of July, 1896, the said Secretary of the State Board of Irrigation made certain inquiries and took such evidence as seemed to him advisable in regard to the right of the Farmers Canal Company to appropriate water from the North Platte river that thereafter and on or about the 19th day of September, 1896, the Secretary of the said State Board of Irrigation formulated an opinion upon the claim as filed by the said Farmers Canal Company in which opinion he undertook to find and determine the point of diversion of the said Farmers Canal and further found "That said ditch is about 81 miles in length; that said ditch or canal covers and reclaims certain lands in said opinion described aggregating about 80,000 acres; that the priority of the appropriation dated from the 16th day of September 1887." Said opinion further recited that the claim of the said Farmers Canal Company was allowed subject to the following limitations and conditions viz;

1st, The water appropriated shall be used for the purpose of irrigation.

2nd, The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd, The amount of the appropriation shall not exceed 1142-6/7

cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and further, said appropriation
42 under any circumstances shall be limited to one-seventieth of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904.

6.

But this defendant and cross petitioner further alleges that the opinion of the Secretary of the State Board of Irrigation aforesaid, contained no finding whatever as to relative priorities of the various appropriators of water from said stream.

7.

This defendant and cross petitioner further alleges on information and belief that on the 7th day of April, 1897, the State Board of Irrigation caused a resolution to be entered on its records affirming the opinion of the Secretary of the said Board on the claim of the Farmers Canal Company above mentioned. But this defendant further alleges that it had no notice whatever of the filing of the so-called claim of the Farmers Canal Company or of any hearing thereon or inquiry with reference thereto or of the rendition of the opinion of the Secretary of the said State Board of Irrigation thereon, or of the resolution entered upon the records of the said Board affirming said opinion; nor did this defendant acquire any knowledge whatever of the above mentioned transactions of said Board and its Secretary until several years after that had taken place; That no copy of said opinion and resolutions was ever at any time delivered to this defendant or filed in the office of the County Clerk of the then Cheyenne County, nor of Morrill County since carved therefrom, nor was any certificate signed by the President of said State Board and attested by the Secretary or otherwise containing the name and the post office address of said Company; or the priority of its appropriation, or the amount of water appropriated by it or the amount of prior appropriation or any other information with reference to said claim of the said Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska, or to the County Clerk of any other county in said State, nor was and certificate with reference to the ap-
43 propriation of this defendant the Alliance Irrigating Canal and Water Power Company ever transmitted to the County Clerk of said Cheyenne County or of Morrill county since organized.

8.

The defendant further complaining of its codefendant, the Tri-State Land Company, alleges that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the State Board of Irrigation passed the resolution above referred to affirming the opinion of said Secretary, the said Farmers Canal Company had not constructed a canal eighty miles

in length; that the claim filed by said Company shows upon its face that it had constructed a canal only 19 miles in length; that said Company had not acquired an appropriation of water for the irrigation of 80,000 acres of land, nor any part thereof, except about 2,000 acres; that at said time said Company had not acquired a right to appropriate 1142-6/7 cubic feet of water per second of time from said river nor any part thereof, except about 28 cubic feet of water per second of time, and said opinion and said resolution are arroneous and false in said particulars; that this defendant was never given any opportunity whatever of appearing *above* the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference to said claim of the Farmers Canal Company nor had it any notice, knowledge or information of the pendency of said claim, the rendering of said opinion or the passage of said resolution by said Board, and said opinion and resolution are therefore as to this defendant absolutely null and void.

9.

This defendant further alleges that neither the Farmers Canal Company nor its grantees, nor either of them, ever appropriated or applied to a beneficial use more than 28 cubic feet of water per second of time, yet notwithstanding this fact the Tri-State Land
44 Company and the Farmers Mutual Canal Company claim to have acquired through and under the Farmers Canal Company a right to appropriate from the North Platte River 1142 6/7 cubic feet of water per second of time with a priority dating from the 16th day of September, 1887 and said companies have through their duly authorized officers and agents at various times asserted and declared that they have a right of appropriation of water from the North Platte river to the extent of 1142 6/7 cubic feet per second of time, continually flowing during the irrigation season of each and every year which is prior to the right of appropriation acquired by this defendant and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the defendant herein, for the purpose of intersecting and diverting into said canal said quantity of water or so much thereof as may be flowing — said river.

10.

Defendant further alleges that during the greater portion of the irrigation season of 1910 the said Tri-State Land Company and the Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of 28 cubic feet of water per second of time, and by so doing did reduce the volume of water flowing in said river at the headgate of this defendant much below the quantity to which this defendant was entitled to divert from said river; that notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said Board, and not-

withstanding the fact that no adjudication was in fact made by said Board of the relative right of this defendant its co-defendants and the plaintiff in this action, yet because of the rendering of the opinion above mention- by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation refused to limit or restrict said Farmers Mutual

45 Canal Company and the Tri-State Land Company, or either of them in the diversion of water from said stream to 28 cubic feet of water per second of time, but on the contrary said State Board of Irrigation caused the headgate of this defendant to be closed down and refused to permit any water to flow into or through its canal, while at the same time it allowed the Farmers Mutual Canal Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of 1142 $\frac{6}{7}$ cubic feet per second of time; that during all of the time that the headgate of this defendant was closed by the State Board of Irrigation as aforesaid, said Farmers Mutual Canal Company and the Tri-State Land Company were diverting several hundred cubic feet of water per second of time from said river, which included the one hundred cubic feet of water per second of time which this defendant was entitled to have flow into and through its said canal for the land subject to irrigation therefrom.

11.

Further complaining of its said codefendant, this defendant alleges that after the date when the said Farmers Canal Company posted a notice upon the bank of said stream of its intention to appropriate water therefrom for its proposed canal for the purpose of watering certain lands designated by it that divers other canals made appropriations of water by posting on the bank at the proposed point of such diversion, and recording in the office of the County Clerk of the County wherein the land proposed to be watered thereby were situate, prosecuted their work of construction vigorously and uninterruptedly, completed their said canal, constructed laterals and applied the water to the land from which said appropriations were made and thereby perfected their rights to such appropriations long before the act creating the State Board of Irrigation, was passed and long before the Tri-State Land Company or the Farmers Mutual Canal Company ever claimed to have

46 acquired any rights from the said The Farmers Canal Company; the canals making such appropriations and constructing and completing their enterprises as above alleged are named defendants herein and are the Ramshorn Ditch Company, Winters Creek Irrigation Company, the Minatare Mutual Canal Company, The Nine Mile Irrigation District, the Brown's Creek Irrigation Company and the plaintiff herein the Enterprise Irrigation District, and the land supplied by each of them embraces territory for which the said The Farmers Canal Company claims to have made appropriation; and this defendant further alleges that a large proportion of the acreage *with* the Tri-State Land Company and the Farmers

Mutual Canal Company claim the right now to water under their alleged appropriation of 1142 6/7 cubic feet is land which was not contemplated should be watered by the appropriation when applied for by the said The Farmers Canal Company and said Tri-State Land Company and said Farmers Canal Company have no right or authority to seek to apply any portion of the water sought to be appropriated by the said The Farmers Canal Company upon the land last referred to.

12.

Further complaining this defendant alleges that to give the said The Farmers Mutual Canal Company or its grantors a priority over this defendant to the use of water to the extent of 1142 6/7 cubic feet per second of time would be to deprive this defendant and the consumers of water from its canal of their property without a right to be heard with reference thereto and without the due process of law; that said opinion and said resolution above referred to constitute a cloud on the defendant's title to an appropriation of water from said stream and unless said cloud is removed by the decree of this court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant this defendant or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of said stream by the Farmers

Mutual Canal Company and the Tri-State Land Company.
47 Wherefore, this defendant joins the plaintiff in its prayer for relief that the priority of the different appropriations claimed by the different parties hereto be marshalled; that the quantities of water each is entitled to and the date of respective priority be determined; that their right thereto be confirmed and quieted; that this defendant be decreed to have acquired a right of appropriation to the amount of one hundred cubic feet of water per second of time continually flowing during each and every irrigation season with priority dating from said 26th day of December, 1892; that its codefendant, the Tri-State Land Company and the Farmers Mutual Canal Company be found and decreed to have no greater priority over this answering defendant than water sufficient to irrigate 2,000 acres of land and that this defendant have all such other and further relief as is equitable and just and to the Court shall seem meet.

THE ALLIANCE IRRIGATING CANAL AND
WATER POWER COMPANY,
By G. J. HUNT.

STATE OF NEBRASKA,
Morrill County, ss:

G. J. Hunt being duly sworn says he is the attorney for The Alliance Irrigating Canal and Water Power Company; that said Company is a corporation; that he knows the contents of the foregoing answer and cross petition and that the facts therein set forth are true as he verily believes.

G. J. HUNT.

Sworn to before me and subscribed in my presence this 5th day of October, 1910.

MARK SPANOGLA,
Notary Public.

[SEAL.]

48 And afterwards on the 12th day of October 1910 there was filed in the office of the Clerk of the District Court of Scotts Bluff County, Nebraska, an answer and amended and supplemental Cross-petition of The Belmont Irrigating Canal and Water Power Company and of the Gering Irrigation District, in words and figures following, to-wit:

(Copy.)

District Court, Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Company, The Minatate Mutual Canal and Irrigation Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigating Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigating Canal and Water Power Company, Defendants.

Amended Answer and Cross-Petition of the Belmont Irrigating Canal and Water Power Company.

Now comes the defendant, The Belmont Irrigating Canal and Water Power Company and answering the petition herein and for its amended cross-petition against its codefendants, Tri-State Land Company and the Farmers Mutual Canal Company:

1.

Admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 8, 11, 12, 13, 14, 15, and 16 of plaintiff's second amended and supplemental petition filed herein and admits all such other allegations therein contained as are set forth in the cross-petition of this defendant herein and denies each and singular all other allegations in said petition contained that are not affirmatively admitted or qualified herein.

2.

For cross-petition against the plaintiff herein The Tri-State Land Company its codefendant and its other codefendants named herein, alleges:

49 That on the 19th day of December 1889, it caused a notice to be posted on the south bank of the North Platte river at or near the point where said stream intersects the north and south center line of section 18, Twp. 20, Range 51, West, of its intention to appropriate from said stream and divert at that point through its ditch or canal, as outlined on the plat hereto attached and made a part hereof 20,000 cubic inches of water, being the equivalent of 400 cubic feet per second of water or a sufficient quantity to irrigate the land shown on said plat lying between the line of its said canal and the bank of the North Platte river; caused a copy of said notice to be filed for record in the office of the county clerk of the then Cheyenne county, and within the period prescribed by statute, began the construction of said canal and pushed the same vigorously, continuously and uninterruptedly until the same was completed in the fall of 1893, and thereafter during the years of 1893 and 1894 constructed 110 miles of lateral ditches and conducted water through the same to lands tributary thereto, exceeding in the aggregate 15,000 acres; that during the succeeding years and wach year thereafter additional laterals were constructed and water conducted to other lands tributary aggregating 7,000 acres; that thereafter it released some of the land for which its appropriation had been made, so that the same might be watered by lower canals, and in the succeeding years extended laterals and delivered water to an additional acreage until now deducting the acreage so released and the school land belonging to the State there is not to exceed 2,000 acres to which the water has not been carried; and this defendant has at all times been willing and ready to supply water to the remaining acreage when called for; that it has done all things required of it by statute to obtain and perfect its appropriation, and has thereby earned, acquired and has the right

50 to appropriate sufficient water to irrigate 27,000 acres or 385.7 cubic feet per second of time as claimed by it in and acquired under the notices posted and recorded as aforesaid.

3.

That thereafter and in the year 1895 the legislature of the State of Nebraska amended the law applicable to the appropriation of water for irrigation purposes by the passage of the act comprising Chapter 69 of the laws of 1895, entitled An Act prescribing the regulation for the appropriation, distribution, and use of water &c. &c., which act provided, among other things for ascertaining the appropriations already made, measuring the streams from which such appropriations had been made, and marshalling the priority of such appropriations by date thereof as the same might appear of record in the office of the County Clerk of the respective Counties

in which such appropriations have been made. That pursuant to said act and in compliance with the request of the Secretary of the State Board of Irrigation, which had been created by said act and by said act had been instructed so to proceed, it requested of, and the County Clerk of Cheyenne County accordingly made a transcript of the notice so filed by this defendant and transmitted the same to the Secretary of the State Board of Irrigation of the State of Nebraska some time prior to the 14th day of July, 1895; that thereafter the Secretary of the State Board of Irrigation forwarded a blank "Claim for the Waters of the State of Nebraska" to be filled out by the Belmont Irrigating Canal and Water Power Company, giving certain information therein requested regarding its claim for the use of water from the North Platte River; that said blank was filled out and forwarded to the Secretary of the State Board of Irrigation in October, 1895; that on or about the 17th day of July, 1896, the Secretary of the State Board of Irrigation made certain inquiries and took certain evidence regarding the claim of the Belmont Irrigating Canal and Water Power Company to appropriate the waters as aforesaid; that on the — day of January 1897, the said Secretary of the State Board of Irrigation formulated an opinion upon the statement submitted by this defendant and the inquiries made and evidence taken by him, as to the claim of this defendant to the appropriation made by it and the construction of its canal, and made the same a matter of record in his office; that this opinion reiterated the fact that this defendant had constructed its canal as hereinbefore alleged, had posted the notice upon the bank of the river at the point of diversion as hereinabove set forth and filed with the County Clerk of Cheyenne County a copy of the notice of appropriation to be therein by him recorded and was entitled to appropriate from said stream 385.7 cubic feet of water per second of time for the irrigation of land herein above described and with priority dating from the 19th day of December 1889.

4.

This defendant further avers that the opinion of the said Secretary of the State Board of Irrigation contained no reference to any other appropriation of water from said stream prior to that of this defendant; The Belmont Irrigating Canal and Water Power Company, nor did said opinion undertake to find or determine that any other person, company or corporation had appropriated or was entitled to appropriate any water whatsoever from said stream prior to the appropriation of this defendant; nor did said opinion contain any finding whatever as to relative priorities of different appropriators therefrom, nor had this defendant any notice that any other person, company or corporation claimed a right to appropriate water from said stream prior to the appropriation of this defendant.

5.

Further answering this defendant shows to the Court that various

52 other claimants for the use of water from said stream filled out similar blanks to the one hereinbefore described and forwarded the same to the Secretary of the said State Board of Irrigation at or about the time this defendant did the same and that the said Secretary of the State Board aforesaid after making such exparte inquiry and taking such testimony as he deemed necessary and advisable in reference to each particular statement submitted, rendered a separate opinion on each so-called claim; that no "claimant" for water so appropriated had any notice whatever of the other claim filed, nor had any so-called claimant for water from said river, any notice of the opinion of said Secretary rendered on the other claim for the use of water from said stream. That this defendant, The Belmont Irrigating Canal and Water Power Company had no notice, knowledge or information concerning the various opinions rendered by the said Secretary of the State Board of Irrigation on other claims for a right to the use of water from the North Platte River until long after the claim had been a matter of record in his office.

6.

That on the 7th day of April, 1897, the said State Board of Irrigation, without any notice to the claimants who had previously made and perfected their right to the appropriation of water from said streams, or any of them and without the knowledge of this defendant caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of the State Board prior to that date, including the opinion rendered on the so-called claim of the Belmont Irrigating Canal and Water Power Company and that this defendant, [had no] knowledge or information of any such action for several years thereafter, nor until shortly prior to the commencement of this suit.

7.

53 Further answering this defendant alleges that in the Spring of 1888, The Farmers Canal Company one of the codefendants named herein, and a corporation organized under the laws of the State of Nebraska for that purpose commenced the construction of a canal for the diverting the water of the North Platte River at a point on the north bank of said river in Scotts Bluff County, Nebraska, where the west line of Section 10, Twp. 23, Range 58 West intersects the north bank thereof, for irrigation purposes. That work of construction continued upon said canal until the year 1890 and the same was constructed easterly from said point of diversion for a distance of about 10 miles when work thereon ceased. That at said time not more than 1,500 acres of land could have been watered from the canal so constructed; that in the spring of 1892 said company resumed work upon said canal enlarging and extending the same until some time in the summer of 1893 when work again ceased thereon, that said canal had then been constructed to a point about 15 miles from the headgate thereof and of sufficient capacity to irrigate not more than 2,500 acres of

land; that only about 2,000 acres of land lying under said canal as constructed were susceptible of irrigation therefrom, and this defendant alleges that said company never irrigated more than 2,000 acres. That said Farmers Canal Company never resumed work upon said canal after the summer of 1893; that after passing through the various mutations of ownership it finally became the property of the defendant Tri-State Land Company, a corporation which in September, 1906, began to enlarge and extend the same and did extend the same during the years 1906 and 1907 to a point about forty miles easterly from its headgate and made it capable of irrigating about 40,000 acres of land. That said Company is preparing to extend said canal an additional 30 or 40 miles so as to make it capable of irrigating 80,000 acres of land. But this defendant alleges that neither the Tri-State Land Company nor its grantor The Farmers Canal Company ever appropriated or applied to a beneficial use more than 28 cubic feet of water per second of time. Yet notwithstanding this fact said Tri-

54 State Land Company or its grantee The Farmers Mutual Canal Company, defendant herein claims a right to divert from the North Platte River 1142 $\frac{6}{7}$ cubic feet of water per second of time with priority dating from September 16, 1887, and bases its claim not upon compliance with the law in force at the date of posting its notice on the bank of the river at the proposed point of diversion but solely upon an alleged finding and adjudication of the State Board of Irrigation and its Secretary. And this defendant alleges on information and belief that the Farmers Canal Company, whose interest its codefendant the Tri-State Land Company, claims to have acquired, filled out and filed with the Secretary of the State Board of Irrigation a blank "Claim for the Waters of the State of Nebraska" similar to the one hereinabove described, and that thereafter, on or about the 17th day of July, 1896, the said Secretary of the State Board of Irrigation made certain inquiries and took such evidence as seemed to him advisable in regard to the right of the Farmers Canal Company to appropriate water from the North Platte River; that thereafter the Secretary of the State Board of Irrigation formulated an opinion upon the claim as filed by the said Farmers Canal and further found "that said ditch is about eighty-one miles in length; that said ditch or canal covers and reclaims certain land therein defined aggregating about 80,000 acres; that the priority of its appropriation dated from the 16th day of September 1887." Said opinion further recited that the claim of the said Farmers Canal Company was allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application to the beneficial use indicated shall extend to September 1, 1904.

55 3rd. The amount of the appropriation shall not exceed 1142 $\frac{6}{7}$ cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that

experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and further said appropriation under any circumstances, shall be limited to one-seventieth of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904.

8.

But this defendant and cross-petitioner further alleges that the opinion of the Secretary of the State Board of Irrigation aforesaid, contained no finding whatever as to the relative priorities of the various appropriators of water from said streams; and further alleges on information and belief that on the 7th day of April 1897, the State Board of Irrigation caused a resolution to be entered on its records affirming the opinion of the Secretary of the State Board on the claim of the Farmers Canal Company above mentioned. But this defendant further alleges that it had no notice whatever of the filing of the so-called claim of the Farmers Canal Company or of any hearing thereon or inquiry with reference thereto, or of the rendition of the opinion of the Secretary of the said State Board thereon, or of the resolution entered upon the records of said State Board affirming said opinion; nor did this defendant acquire any knowledge whatever of the above mentioned transactions of said Board and its Secretary until several years after they had taken place; that no copy of said opinion and resolution was ever at any time delivered to this defendant or filed in the office of the County Clerk of the *tehn* Cheyenne County; nor was any certificate signed by the President of said State Board and attested by the Secretary or otherwise, containing the name or the post office address of said company, or the priority of its appropriations, or the amount of water appropriated by it or the amount of prior appropriation, or any other information with reference to said claim of The Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska, or to the County Clerk of any other County in this State, nor was any certificate with reference to the appropriation of this defendant, The Belmont Irrigating Canal and Water Power Company ever transmitted to the County Clerk of said Cheyenne County or of Morrill County since organized out of a portion thereof.

9.

This defendant further complaining of its codefendant the Tri-State Land Company alleges that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the State Board of Irrigation passed a resolution above referred to affirming the opinion of said Secretary the said Farmers Canal Company had not constructed a canal eighty miles in length; that the claim filed by said company shows upon its face that said company had constructed a canal only about nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of 80,000 acres of land nor any part thereof

except about 2,000 acres; that at said time said company had not acquired a right to appropriate 1142 6/7 cubic feet of water per second of time from said river nor any part thereof, except about 28 cubic feet of water per second of time and said opinion and said resolution are erroneous and false in said particulars; that this defendant was never given any opportunity whatever of appearing before the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference to said claim of the Farmers Canal Company, nor had it any notice, knowledge nor information of the pendency of said claim, the rendering of said opinion or the passage of said resolution by said Board, and said opinion and resolution are therefore as to this defendant absolutely null and void.

57

10.

This defendant further alleges that neither the Farmers Canal Company nor its grantee, nor either or them ever appropriated or applied to a beneficial use more than 28 cubic feet of water per second of time, yet notwithstanding this fact the Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired through and under the Farmers Mutual Canal Company, a right to appropriate from the North Platte River 1142 6/7 cubic feet of water per second of time with priority dating from the 16th day of September, 1887, and said companies have through their duly authorized officers and agents at various times asserted and declared that they have a right of appropriation of water from the North Platte River to the extent of 1142 6/7 cubic feet per second of time, continually flowing through the irrigation season of each and every year, which is prior to the right of appropriation acquired by this defendant, and have threatened to construct and maintain a dam across said river immediately below the headgate of its said canal and above the headgate of the defendant herein, for the purpose of intersecting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river.

—.

Defendant further alleges that during the greater portion of the irrigation season of 1910 the said Tri-State Land Company and the Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of 28 cubic feet of water per second of time, and by so doing did reduce the volume of water flowing in said river at the headgate of this defendant's canal much below the quantity which this defendant was entitled to divert from said river, and that by reason of the diminished flow of said stream at this season of the year there was no water left therein to supply this defendant canal; that notwithstanding the

fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said Board, and notwithstanding the fact that no adjudica-

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tion was in fact made by said Board of the relative right of this defendant, its codefendants and the plaintiff in this action, yet because of the rendering of the opinion above mentioned by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation refuses to limit or restrict said Farmers Mutual Canal Company and the Tri-State Land Company, or either of them, in the diversion of water from said stream to 28 cubic feet of water per second of time but on the contrary said State Board of Irrigation caused the headgate of this defendant to be closed down and refused to permit any water to flow into or through its canal, while at the same time it allowed the Farmers Mutual Canal Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of 1142 6/7 cubic feet per second of time; that during all the time that the headgate of this defendant was closed by the State Board of Irrigation as aforesaid said Farmers Mutual Canal Company and the Tri-State Land Company were diverting several hundred cubic feet of water per second of time from said river, which included the three hundred and eighty-five and seven-tenths (385.7) cubic feet of water per second of time, which this defendant was entitled to have flow into and through its said canal for the land subject to irrigation therefrom.

12.

Further complaining this defendant alleges that to give said Tri-State Land Company and the Farmers Mutual Canal Company or their grantor a priority over this defendant to the use of water to the extent of 1142 6/7 cubic feet per second of time would be to deprive this defendant and the consumers of water from its canal of their property without a right to be heard with reference thereto, and without due process of law for the flow of said stream at the said stages of the season is insufficient to furnish the quantity of water claimed by said Tri-State Land Company and the Farmers Mutual Canal Company together with the quantity to which this defendant is entitled; for which reason said opinion and said resolution above referred to constitute a cloud on this defendant's title to the appropriation of water from said stream and unless said cloud is removed by the decree of this Court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant this defendant or the consumers of water under its canal any relief whatever against the unlawful diversion of water of said stream by the Farmers Mutual Canal Company and the Tri-State Land Company.

Wherefore, this defendant joins the plaintiff in its prayer for relief in that the priority of the different appropriations claimed by the different parties hereto be marshalled; that the quantity of water each is entitled to and the date of its respective priority be determined; that their right thereto be confirmed and quieted; that this defendant be decreed to have acquired a right of appropriation to the amount of 385.7 cubic feet of water per second of time continually flowing during each and every irrigation season with priority

dating from the 19th day of December, 1889; that its codefendant the Tri-State Land Company and the Farmers Mutual Canal Company be found and decreed to have no greater priority over this answering defendant than water sufficient to irrigate 2,000 acres of land and that this defendant have all such other and further relief as equity may require and to the Court shall seem meet.

THE BELMONT IRRIGATING CANAL
AND WATER POWER COMPANY,

By G. J. HUNT, *Its Attorney.*

60 STATE OF NEBRASKA,
County of Morrill, ss:

G. J. Hunt, being first duly sworn, says he is Attorney for the Belmont Irrigating Canal and Water Power Company, the defendant above named; that said defendant is a corporation; that affiant has read the foregoing answer and cross petition, knows the contents thereof and that the facts therein set forth are true as he verily believes.

G. J. HUNT.

Sworn to before me and subscribed in my presence this 5th day of October, 1910.

MARK SPANOGLE,
Notary Public.

61 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,
vs.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chumney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Copartnership under the Firm Name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemented Cross-petition.

Comes now the above named defendant, The Gering Irrigation District, and for answer to the amended and supplemental petition of the plaintiff herein alleges:

First. This defendant admits the allegation- contained in paragraphs one to nine inclusive, eleven to twenty-one inclusive, twenty-

three to twenty-six inclusive, and twenty-eight of said amended and supplemental petition, and all other allegations in said amended and supplemental petition contained that are hereafter affirmatively set out in the cross-petition of this defendant denies each and every other allegation in said amended and supplemental petition contained, except such allegations as are hereinafter admitted or qualified.

Amended and Supplemental Cross-petition.

62 For its amended and supplemental cross-petition against the plaintiff and the other defendants in this action, this defendant, for and on behalf of itself and the users of water from its canal hereinafter described, alleges:

First. That at all times hereinafter mentioned this defendant, The Gering Irrigation District, was and now is, a corporation organized under the provisions of an act of the Legislature of the State of Nebraska, entitled, "An Act to provide for the organization and government of Irrigation Districts and to provide for the acquiring of canals already built or partly constructed; for the acquiring of the rights of way to build irrigation ditches or canals and other property; for the dividing of certain portions of the State of Nebraska into irrigation districts and for said irrigation districts to vote bonds for the purpose of constructing irrigating canals; for the purpose of buying and purchasing by said Irrigation Districts irrigation canals already constructed or partially constructed and the paying for the same; providing for a system of revenue to be raised by taxation upon the property in said irrigation districts, to pay the interest and principal of said bonds and the manner in which the same shall be done; the holding of elections in said districts for the purpose of electing officers; providing for the management of said districts; also providing for the increase and enlargement of said districts whenever it may be necessary to increase their size."

Approved —, 1905.

Second. That on the 15th day of March 1897 this cross-petitioner The Gering Irrigation District made application to the State Board of Irrigation of the State of Nebraska for a permit to appropriate 555 cubic feet of water per second of time from the North Platte River for the irrigation of the lands embraced within the boundaries of said irrigation district which said lands were described in said application for an appropriation and which are the same lands
63 hereinafter described in the certificate issued by the State Board of Irrigation. That said application for a permit to appropriate water from the North Platte River was granted by said the State Board of Irrigation of the State of Nebraska, subject to the following limitations and conditions, to-wit:

"1st. The work of excavation or construction shall begin on or before June 1st, 1898.

2nd. The time for completing the work or perfecting the appropriation shall extend to September 1st, 1900.

3rd. The time for completing the application of water to a beneficial use shall extend to September 1st, 1905.

4th. The amount of appropriation shall not exceed 500 feet per second and shall be limited to one cubic foot per second for each seventy (70) acres of land reclaimed on September 1st, 1905.

5th. The territory claimed and the amount of water already acquired by prior appropriations from this stream and its tributaries having not yet been determined therefor, formal notice is hereby given that this permit may not carry with it the right to any water whatever nor the right to irrigate all the territory applied for."

Third. That this cross-petitioner did commence the construction of its canal before June 1st, 1898 as in said application described and did prosecute said work diligently and uninterruptedly to completion and did complete the same before the 1st day of September 1900.

Fourth. That the headgate of said canal is located on the south bank of the North Platte River in the S. E. 1/4 of Section 4, Township 23 north, Range 58 West of the 6th P. M. in Scotts Bluff County, Nebraska, from which point said canal extends in a southeasterly direction through Sections 9, 10, 15, 22, 23, 26, 25, 36 of Township 23 north, Range 58 west of the 6th P. M. 31, 32, 33, 34, 35,

64 36 of Township 23 north, Range 57 west of the 6th P. M.
31 of township 23 north, Range 56 west of the 6th P. M.
6, 5, 8, 9, 16, 15, 14, 23, 26, and 25 of Township 22 north, Range 56 west of the 6th P. M. 30, 29, 28, 27, 34 of Township 22 north, Range 55 west of the 6th P. M. 3, 10, 15, 22, 26, 25 of Township 21 north Range 55 west of the 6th P. M. 30, 19, 20, 21, 16, 15, 14, 22, 27, 33, of Township 21, north, Range 54 west of the 6th P. M. 5, 4, 9, 10, 11, 2, 1. of Township 20 north, Range 54 west of the 6th P. M. That the intake of said ditch was and is 125 feet wide and carries water to a depth of 3 feet until it intersects the canal of the Mitchell Irrigation District. That the intake ditch of this cross-petitioner intersects the canal of the Mitchell Irrigation District at a point about 3 miles below the headgate, from which point this cross-petitioner and The Mitchell Irrigation District use one and the same canal to a point in Section —, Township 22 north, Range 55 west of the 6th P. M. from which point the remainder of said canal belongs exclusively to the Gering Irrigation District. That the portion of said canal used jointly by this cross-petitioner and the Mitchell Irrigation District is 7 feet deep, 40 feet wide on the bottom, 60 feet wide on top and has a grade of one foot per mile; that the canal of this cross-petitioner is 6 feet deep, 30 feet wide on the bottom, 40 feet wide on top with a grade of one foot per mile from a point about 20 miles below the headgate thereof to a point about 40 miles below the headgate thereof. That the canal of this cross-petitioner is 3 feet deep, 30 feet wide on the bottom, 26 feet wide on top with a grade of one foot per mile from a point about 40 miles below the headgate to a point about 50 miles below the headgate thereof. That said canal is 3 feet deep 12 feet wide on the bottom and 18 feet wide on top with a grade of one foot per mile from a point about 50 miles below the headgate to

the terminus thereof, and is sufficiently large to carry a sufficient quantity of water for the irrigation of all the lands embraced in said irrigation district, the same being the land hereinafter described.

65 Fifth. This cross-petitioner further avers that immediately after the completion of said canal water was conducted through the same for the irrigation of the lands included in said irrigation district. That a portion of said lands *were* irrigated during the year 1900. That the amount of land irrigated through and by means of said canal was increased each and every year from the year 1900 until the year 1905, when all of said lands had been irrigated.

Sixth. That thereafter and on, to-wit about the 27th day of October 1905, said The Gering Irrigation District by its proper officers made proof of the application of water to all of the above described lands and filed the same with the State Board of Irrigation of the State of Nebraska. That thereafter and on, to-wit, about the 2nd day of November 1907, said the State Board of Irrigation of the State of Nebraska issued a certificate of appropriation of water to this cross-petitioner, The Gering Irrigation District, which is in words and figures following, to-wit:

UNITED STATES OF AMERICA,
State of Nebraska:

Certificate No. 322.

Division No. 1-A.

Office of State Board of Irrigation.

Certificate of Appropriation of Water.

This Is To Certify, that The Gering Irrigation District of Gering, State of Nebraska has appropriate water from the North Platte River to be used through the Gering Canal for irrigation and that the State Board of Irrigation under the provisions of Art. 2, of the Irrigation Law of the State of Nebraska, has determined and established the priority and amount of the said appropriation, as follows:

66 The priority of the appropriation dated from March 15, 1897; the priority for the water-shed is No. 176, and the priority for the stream is No. 54.

The amount of the appropriation is 208½ cubic feet per second; the amount of prior appropriation from the water-shed is — cubic feet per second, and the amount of prior appropriation from the stream is — cubic feet per second. The lands to be irrigated are: 17.50 acres in Sec. 26 and Sec. 27, 131.40 acres in Sec. 34, 34, 566.01 Acres in Sec. 35, and 130.97 Acres in Sec. 36. of T. 22. N., R. 55 W.; 646.76 Acres in Sec. 1, 713.60 Acres in Sec. 2, 50.84 Acres in Sec. 3. 28.14 in Sec. 10. 633.06 in Sec. 11, 637.23 Acres

in Sec. 12, 637.00 Acres in Sec. 13, 656.00 in Sec. 14, 339.70 Acres in Sec. 15, 110.49 Acres in Sec. 22, 497.70 Acres in Sec. 23, 565.14 Acres in Sec. 24, of T. 21 N. R. 55 W; 24.93 Acres in Sec. 4, 87.61 Acres in Sec. 5, 300.68 Acres in Sec. 6, 558.22 Acres in Sec. 7, 585.33 Acres in Sec. 8, 213.97 Acres in Sec. 9, 18.31 Acres in Sec. 10, 261.18 Acres in Sec. 14, 309.39 Acres in Sec. 15, 413.76 Acres in Sec. 16, 626.15 Acres in Sec. 17, 628.84 Acres in Sec. 18, 329.24 Acres in Sec. 19, 110.44 Acres in Sec. 20, 40.00 Acres in Sec. 21, 82.31 Acres in Sec. 22, 617.25 Acres in Sec. 23, 336.37 Acres in Sec. 24, 309.25 Acres in Sec. 25, 633.37 Acres in Sec. 26, 537.57 Acres in Sec. 27, 320.50 Acres in Sec. 34, 581.56 Acres in Sec. 35, and 293.25 Acres in Sec. 36, of T. 21 N. R. 54 W.: 77.33 in Sec. 4, of T. 20 N., R. 54 W. of the 6th P. M. amounting in all to 14,621.24 Acres.

The right to water herein confirmed is restricted to the irrigation of the above described land.

The amount of appropriation shall not exceed the amount herein stated; neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of
67 good husbandry; and, further, said appropriation is limited to one-seventieth ($1/70$) of a cubic foot per second of time for each acre of the above described land to which water is actually and usefully applied for irrigation.

I, George Lawson Sheldon, President of the State Board of Irrigation of the State of Nebraska, have hereunto set my hand this 2nd day of November 1907.

GEORGE LAWSON SHELTON, *President*.

Attest:

ADNA DOBSON, *Secretary*.

Seventh. This cross-petitioner further avers that on or about the 31st day of August 1887, a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the State of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of said State. That in the spring of 1888, said The Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte River at a point on said river in Scottsbluff County, Nebraska, where the west line of Section 10, Township 23 north, Range 58 west, intersects the north bank thereof for irrigation purposes. That said point of diversion of the canal of the Farmers Canal Company is directly across the river from the headgate of the canal of this cross-petitioner. That said The Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles when said company ceased work thereon. That at said time there were not more than 1500 acres of land susceptible to irrigation from said canal as then con-

68 structed, and the capacity of said canal was not sufficient to carry water for more than 1000 or 1200 acres of land. That said company did not again resume work on said canal until the spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the summer of 1893, when it again ceased work on said canal. That when said company ceased work on said canal in 1893, it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about 2500 or 3000 acres of land. That as completed in 1893, there were not more than 2000 acres of land susceptible of irrigation from said canal, and said company and its grantors never irrigated more than 2000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2000 acres of land.

Eighth. That no further work was done on said canal from the time that the Farmers Canal Company ceased work thereon in the year of 1893, until the fall of 1906, when work was again resumed thereon and prosecuted until the fall of 1907; that during the latter period, said canal was enlarged at the headgate to a width of 90 feet on the bottom and a depth of 11 feet and extended in an easterly direction for a distance of about 40 miles from the headgate thereof;

Ninth. This cross-petitioner further avers that at and prior to the date of the issuance of the certificate above set out there never had been more than 2000 acres of land irrigated from said canal, of the Farmers Canal Company, and the owners of said canal and of lands under the same never did divert or appropriate through or by means of said canal, at any time prior to the 2nd day of November 1907, the date of the certificate above mentioned, more than 28 cubic feet of water per second of time; that said certificate did not contain any statement whatever of the amount of ap-
69 propriation made prior thereto, and this cross-petitioner having at said time actual knowledge of the fact that not more than 28 cubic feet of water per second of time had ever been appropriated through and by means of the canal of the Farmers Canal Company above mentioned, relied on the actual and physical conditions of which this cross-petitioner had knowledge and did not know or have any reason to believe that there was any record whatever in the office of the State Board of Irrigation showing anything to the contrary.

Tenth. This cross-petitioner further avers on information and belief that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of The Farmers Canal Company to appropriate water from the North Platte River; that thereafter and on or about the 19th day of September 1896, said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska, its claim for an appropriation of water from the North Platte River

to the extent of 725,000 inners' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres; that thereafter and on or about the 9th day of January 1897, the Secretary of the State Board of Irrigation did render an opinion on said claim and made the same a matter of record in his office, in which opinion, he, the said Secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte River in the southwest quarter of the southeast quarter of section three, township twenty-three north, range fifty-eight west; that said ditch or canal covers and reclaims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dated 70 from the 16th day of September 1887. Said opinion further stated that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd. The amount of the appropriation shall not exceed eleven hundred and forty-two and six-sevenths (1142-6/7) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth (1/70) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

But said opinion contained no finding whatever as to the relative priorities of the various appropriators of water from said stream.

Eleventh. This cross-petitioner further avers on information and belief that several other claimants for the use of water from the North Platte River had, prior to the 7th day of April 1897, filed with the Secretary of the State Board of Irrigation of the State of Nebraska, their respective claims for the use of water from the North Platte River; that the State Board of Irrigation after making such exparte inquiry and taking such evidence exparte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims; that no claimant for water from said river had any notice whatever of the claims for water filed by others, nor had any claimant, for water from said river, any notice of the opinions of the Secretary of the State Board of Irrigation on the other claims for water from said river; that on the 7th day of April 1897, the State Board of Irrigation, without any notice to the claimants of appropriations of water from said river or any of them, and without the knowledge of this cross-petitioner or its grantor, caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of said Board, prior to that date, including the opinion rendered on the claim of The Farmers Mutual Canal Company.

Twelfth. This cross-petitioner further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the said State Board of Irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land nor any part thereof, except about two thousand acres; that at said time said company had not acquired a right to appropriate 1142-6/7 cubic feet of water per second of time from said river nor any part thereof, except only about twenty-eight cubic feet of water per second of time; and said opinion and said resolution are erroneous and false in said particulars.

Thirteenth. This cross-petitioner further avers that at the time it received the certificate of appropriation above mentioned, it had no notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon, or inquiry with reference thereto, or of the resolution entered upon the records of said Board, affirming said opinion, nor did this cross-petitioner acquire any knowledge whatever of the above mentioned transaction of said

72 Board and its Secretary until after the commencement of this action by the plaintiff herein; that no copy of said opinion and resolution, or either of them, was ever at any time delivered to this cross-petitioner or filed in the office of the County Clerk of Scotsbluff County, Nebraska, or of any other County in the State of Nebraska, nor was any certificate signed by the President of said Board and attested by the Secretary or otherwise, of the priority or amount of the appropriation of The Farmers Canal Company, or any other information with reference to the claim of said company, ever transmitted to the County Clerk of Scotsbluff County or any other county in the State of Nebraska; and by reason of the failure of the certificate forwarded to this cross-petitioner by the State Board of Irrigation, to state the amount of prior appropriation from said stream or from said water-shed, this cross-petitioner was lead to believe and did believe that said State Board of Irrigation had not determined the amount of the appropriation of The Farmers Canal Company, or the amount of any other prior appropriation; that had said certificate shown that The Farmers Canal Company had been allowed an appropriation to the extent of 1142-6/7 cubic feet of water per second of time, or any other amount in excess of twenty-eight cubic feet of water per second of time, or had it stated the amount of prior appropriations, so as to lead this cross-petitioner to inquire as to the amount of water allowed each prior appropriator, this cross-petitioner would have discovered the existence of the opinion and resolution above referred to and would have appealed from the allowance of the amount of water therein referred to, prior to the appropriation of this cross-petitioner, and the reason that this cross-petitioner had not made an investigation upon receipt of said certificate of appropriation was because it be-

lieved that the determination of the amount of prior appropriations was to be made at some subsequent time and that it would have notice and a right to be heard with reference thereto.

73 Fourteenth. This cross-petitioner further avers that The Farmers Mutual Canal Company has through certain conveyances become the owner of the said ditch or canal, formerly owned by the Farmers Canal Company and has succeeded to all the rights acquired by said the Farmers Canal Company, and the defendant the Tri-State Land Company, is the owner of a majority or controlling interest in the capital stock of The Farmers Mutual Canal Company and said The Farmers Mutual Company claims to have acquired, through and under the Farmers Canal Company, a right to appropriate from the North Platte River 1142-6/7 cubic feet of water per second of time, with a priority dating from the 16th day of September 1887, and will unless restrained by a decree of this Court, construct and maintain a dam across said river immediately below the headgate of its canal and above the headgate of the canal of this cross-petitioner, for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river.

Fifteenth. This cross-petitioner further avers that during the greater portion of the irrigation season of 1910, said The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of twenty-eight cubic feet of water per second of time; that the State Board of Irrigation did during said season of 1910, refuse to limit or restrict said The Farmers Mutual Canal Company in the diversion of water from said stream to twenty-eight cubic feet of water per second of time or to any quantity less than 1142-6/7 cubic feet of water per second of time; that while the State Board of Irrigation was permitting said The Farmers Mutual Canal Company to divert from said river large quantities of water in excess of twenty-eight cubic feet of water per second of time, it caused the headgate of

74 the canal of this cross-petitioner to be closed down and refused to permit any water to flow into or through the canal of this cross-petitioner; that the only reason or excuse offered by the State Board of Irrigation for closing down the headgate of the canal of this cross-petitioner and permitting the Farmers Mutual Canal Company to divert large quantities of water from said river to which this cross-petitioner was entitled, was the fact that the Secretary had rendered the opinion above mentioned with reference to the claim of the Farmers Canal Company and said Board had passed the resolution above mentioned affirming said opinion.

Sixteenth. That the said action of the State Board of Irrigation in closing down the headgate of the canal of this cross-petitioner and permitting the Farmers Mutual Canal Company to divert large quantities of water from said river, has resulted in depriving this cross-petitioner and the users and consumers of water from its canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution above referred to in reference to the claim of the Farmers

Canal Company constituted a cloud on this cross-petitioner's title to an appropriation of water from said stream and unless said cloud is removed or cleared by a decree of this Court, the State Board of Irrigation will continue in the future as it has in the past to allow The Farmers Mutual Canal Company to divert from said river the water which this cross-petitioner and the consumers of water from its canal have acquired a prior right to appropriate and will thus continue to deprive this cross-petitioner and the consumers of water from its canal of their property without due process of law.

Seventeenth. That the average flow of water in said river at or near the headgate of the canal of this cross-petitioner and that of the defendant, The Farmers Mutual Canal Company, during
75 part of July and during all of the months of August, September, October and November has been for several years last past and will be in the future much less than 1142-6/7 cubic feet of water per second of time, the amount which The Farmers Mutual Canal Company claims a right to divert and appropriate and which said Company will divert and appropriate from said river and which the State Board of Irrigation will permit said The Farmers Mutual Canal Company to divert and appropriate from said river to the entire exclusion of this cross-petitioner, unless the opinion and resolution of the State Board of Irrigation on the claim of the Farmers Canal Company above mentioned is vacated, set aside and held for nought by a decree of this Court.

Eighteenth. This cross-petitioner further avers that the Farmers Mutual Canal Company nor its grantors ever acquired a right to divert and appropriate more than twenty-eight cubic feet of water per second of time prior to the right acquired by this cross-petitioner and all other rights, if any, that have been acquired by said The Farmers Mutual Canal Company or its grantors, or either of them, are junior and inferior to the right of appropriation of water from said river acquired by this cross-petitioner; that if The Farmers Mutual Canal Company or its grantors, ever did by virtue of any proceedings taken by said companies or either of them, or otherwise, initiate a right of appropriation of water from said stream which upon application to a beneficial use would ripen into an appropriation, said rights so initiated, if any, have become lost to said The Farmers Mutual Canal Company and its grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged rights, if any rights were in any manner ever initiated or acquired by said company or
its grantors.

76 Wherefore this cross-petitioner prays:

1st. That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired a right to appropriate from said river and the relative priorities of said rights of appropriation.

2nd. That it be adjudged and decreed that this cross-petitioner has acquired a right of appropriation of water from the North Platte River to the extent of 208 5/8 cubic feet of water per second of time continually flowing during each and every irrigation season with a

priority dating from the 15th day of March, 1897, and that said right is prior to the right of appropriation of the Farmers Mutual Canal Company and its grantors, with the exception of 28 cubic feet per second of time and that the title to said right of appropriation of this cross-petitioner be quieted and confirmed in this cross-petitioner as against all of the parties to this action and each of them, and that the cloud cast on this cross-petitioner's title by reason of the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board confirming said opinion be removed.

3rd. That the defendants The Tri-State Land Company and each of them be enjoined and restrained from decreasing or diminishing the flow of water of said river at the headgate of the canal of this cross-petitioner below the amount of water which said cross-petitioner has acquired a right to appropriate, to-wit, 208 $\frac{3}{4}$ cubic feet of water per second of time continuously flowing during each and every irrigation season and the amount of water, if any, which it may be adjudged and decreed that this cross-petitioner shall permit to flow down the channel of said river past its headgate.

77 4. That this cross-petitioner be granted such other and further relief as may be just and equitable.

5. That this cross-petitioner have and recover judgment for the costs of this action.

THE GERING IRRIGATION DISTRICT,
By MORROW & MORROW,
Its Attorneys.

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

A. A. Miller, being first duly sworn, deposes and says that he is the Secretary of the Gering Irrigation District, the cross-petitioner herein; that he has read the foregoing answer and cross-petition and knows the contents thereof, and that the facts therein stated are true as he verily believes.

A. A. MILLER.

Subscribed in my presence and sworn to before me this twelfth day of October, A.D. 1910.

[SEAL.]

M. H. McHENRY,
Clerk District Court.

And afterwards, on the 15th day of October, 1910, there was filed in the office of said Clerk an Answer and Amended and Supplemental Cross-petition, of the Central Irrigation District, in the words and figures following, to-wit:

78 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,
VS.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigation Company, The Steamboat Ditch Company, The Nine-mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Copartnership Under the Firm Name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemental Cross-petition.

Comes now the above named defendant, The Central Irrigation District, and for answer to the amended and supplemental petition of the plaintiff herein alleges:

First. This defendant admits the allegations contained in paragraphs one to nine inclusive, eleven to twenty-one inclusive, twenty-three to twenty-six inclusive and twenty-eight of said amended and supplemental petition and all other allegations in said amended and supplemental petition contained that are hereafter affirmatively set out in the cross-petition of this defendant; this defendant denies each and every other allegation in said amended and supplemental petition contained, except such allegations as are hereinafter admitted or qualified.

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Amended and Supplemental Cross-petition.

For its amended and supplemental cross-petition against the plaintiff and the other defendants to this action, this defendant, for and on behalf of itself and the users of water from its canal hereinafter described, alleges:

First. That on or about the 23rd day of June, 1890, The Mutual Irrigation and Water Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska posted a notice at a point on the south bank of the North Platte River about 1192 feet north of the corner of Sections 26, 27, 34 and 35 in Township 22 north, range 55 west of the 6th P. M. in Scotts Bluff County, Nebraska, of its intention to appropriate and divert a sufficient quantity of water from said river at said point to fill a canal 7 feet wide on the bottom, 13 feet wide on the top and 3 feet deep, with a fall of $1\frac{1}{2}$ feet per mile; said water to be conducted through a

canal in a southeasterly direction of about four and one-half miles, for irrigation and other useful and beneficial purposes, and on the same day a copy of said notice was filed for record in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska.

Second. That immediately after the posting of said notice above mentioned said The Mutual Irrigation and Water Company commenced the construction of the canal from said point of diversion and prosecuted the same diligently and uninterruptedly until about the first day of July, 1901, at which time said canal was completed for a distance of about four and one-half miles.

Third. That at said time said canal was about 12 feet wide on the bottom, with a grade of 2 feet per mile. That on or about the first day of July, 1891, said The Mutual Irrigation and Water
80 Company commenced conducting water through said canal from the North Platte River to the lands hereinafter described, that being the place of intended use, and continued to conduct water through the same during the balance of the irrigation season of 1891.

Fourth. That on or about the 9th day of November, 1891, said The Mutual Irrigation and Water Company sold and conveyed said canal together with the right of appropriation acquired by it and all other rights and franchises appurtenant, thereto, to The Central Irrigation Canal and Water Power Company; that on or about the 10th day of November, 1891, said The Central Irrigation Canal and Water Power Company decided to change the point of diversion of the water of said river, and on said day posted a notice at the point on the south bank of the North Platte River to which it intended to change the point of diversion of said canal, to-wit: a point 920 feet west of a point 1400 feet north of the corner of Sections 34, 35, 26, and 27 in Township 23 north, Range 55 west, of the 6th P. M., of its intention to so change the point of diversion, and on the 11th day of November, 1891, a copy of said notice was filed in the office of the County Clerk of Scotts Bluff County, Nebraska, and recorded in Volume A of Irrigation records at page 107.

That immediately thereafter said The Central Irrigation Canal and Water Power Company commenced to enlarge said canal and prosecuted the same diligently and uninterruptedly to completion. That when completed it was 8 feet deep and 50 feet wide at the bottom at the headgate, with a grade of 2 feet per mile. At the end of the first mile it was 4 feet deep and 24 feet wide on the bottom, with a grade of 2 feet per mile. At the end of 2 miles it was 2
81 feet deep and 16 feet wide on the bottom, with a grade of 2 feet per mile; at the end of the third mile it was 2 feet deep and 12 feet wide on the bottom, with a fall of $2\frac{1}{2}$ feet per mile.

At the end of the fourth mile it was 2 feet deep and 8 feet on the bottom, with a fall of 3 feet per mile and passed through the following described lands, to-wit: Sections 27, 26, 35 and 36 in Township 22 north, Range 55 west of the 6th P. M., Section 1 Township 21 north, Range 55 west, Sections 6, 7, and 5 in Township 21 north, Range 54 west and was about 7 miles in length from the headgate.

Fifth. That in July, 1891, water was conducted through said canal from the North Platte River to the lands subject to irrigation therefrom, said lands being the place of intended use of said water. That a portion of the land subject to irrigation from said canal was irrigated during the irrigation season of 1891, and the amount of land irrigated therefrom was increased each year thereafter until all of the lands subject to irrigation from said canal *was* reclaimed; that all of said lands had been reclaimed by means of said canal in the year 1896 or 1897, and all of said lands had been irrigated from said canal during each and every year thereafter. The said lands are described as follows:

Part of Lots 5 and 6, Section 26, 5 acres; Part of Lots 1 and 2, Section 35, 5 acres; lots 2, 3, 4, 5, and the S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part of E. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of Section 36, 351 acres; part of Lots land 2, Section 2, Township 21 north, Range 55 west, 40 acres; S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, lots 3, 4, 5, and 6 Section 31, Township 22, Range 54 west 33.5 acres; Lots 3 and 4, Section 6, Township 21 north, Range 54 west, 81 acres; lot 1, S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Section 6, 80 acres; Lot 2 and S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Section 6, 80 acres; W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ Section 5, 80 acres; N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Section 6, 40 acres; N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ Section 7, 120 acres; Part of W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ Section 7, 40 acres; N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Section 8, 40 acres; N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ Section 9, 80 acres; N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ Section 9, 80 acres; N. $\frac{1}{2}$ Section 9, 320 acres; S. W. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ Section 4, 200 acres; Part of the E. $\frac{1}{2}$ Section 10, 200 acres; all in Township 21, Range 54.

82 Said lands being located between the North Platte River and said Canal.

Sixth. That on the — day of — this cross-petitioner, The Central Irrigation District was organized under the provisions of an Act of the Legislature of the State of Nebraska, entitled "An Act to provide for the organization and government of irrigation districts and to provide for the acquiring of canals already built or partly constructed, for the acquiring of the right of way to build irrigation ditches or canals and other property, for the dividing of certain protions of the territory of the State of Nebraska into irrigation districts and for said *said* irrigations districts to vote bonds for the purpose of constructing irrigation canals for the purpose of buying and purchasing by said irrigation districts, irrigation canals already constructed or partially constructed, and paying for the same, providing for a system of revenue to be raised by taxation upon the property in said districts, and the manner in which the same shall be done, and holding of elections in said districts, for the purpose of electing officers and providing for the management of said districts, also providing for the increase and enlargement of said districts whenever it may become necessary or best to increase their size."

Approved March 26th, 1895.

That said district embraced and included therein, and still embraces and includes all of the above described lands, and ever since said time has been and now is a corporation duly organized and

existing under and by virtue of the provisions of said act of the Legislature of the State of Nebraska.

Seventh. That on the — day of — The Central Irrigation Canal and Water Power Company sold and conveyed to The Central Irrigation District, cross-petitioner herein, its said canal above described, and all the water rights, franchises, privileges, immunities and property of every nature and description theretofore acquired by it, and ever since said time said The Central Irrigation District has been and now is the owner of the same.

Eighth. That be virtue of the performance of the acts above embraced by this cross-petitioner and its grantors, said cross-petitioner has acquired and is now the owner of the right to divert and appropriate from the North Platte River a sufficient quantity of water for the irrigation of the above described lands, to-wit: 36 cubic feet of water per second of time continuously flowing during each and every irrigation season, with a priority dating from the date of posting the notice above mentioned, to-wit, the 23rd day of June 1890.

Ninth. This cross-petitioner further avers that on or about the 31st day of May 1895, the County Clerk of Scotts Bluff County, Nebraska, caused a transcript of the above mentioned notice to be filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska; that thereafter the said Secretary of the State Board of Irrigation forwarded to The Central Irrigation Canal and Water Power Company a blank "Claim for the Waters of the State of Nebraska". which was thereafter filled out and returned to the office of the Secretary of the State Board of Irrigation and filed in said office; that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation made certain inquiry and took certain evidence regarding the claim of The Central Irrigation Canal and Water Power Company and on the — day of — 1897, the said Secretary of the State Board of Irrigation rendered an opinion on said claim and made the same a matter of record in his office, in which opinion he, the said Secretary, found and determined that The Central Irrigation Canal and Water Power Company had constructed a ditch or canal as stated in this cross-petition; that said ditch or canal covers and re-claims the lands herein described and that the priority of the appropriation of said The Central Irrigation Canal and Water Power Company dated from the 23rd day of June 1890.

Tenth. This cross-petitioner further avers that said opinion of the Secretary of the State Board of Irrigation contained no finding whatever regarding any other appropriation or claim for the use of water from said stream, nor did said opinion determine or find that any other person, company, corporation or party was entitled to appropriate any water whatever from said stream, either prior or subsequent to said The Central Irrigation Canal and Water Power Company, nor did said opinion contain any finding whatever as to the relative priorities of the various appropriators of water from said stream; that said The Central Irrigation Canal and Water Power Company had no notice that any person, company or corporation

claimed the right to appropriate water from said stream prior to the said Central Irrigation Canal and Water Power Company.

Eleventh. This cross-petitioner further avers on information and belief that several other claimants for the use of water from the North Platte River had, prior to the 7th day of April 1897, filed with the Secretary of the State Board of Irrigation of the State of Nebraska their respective claims for the use of water from the North Platte River; that the Secretary of the State Board of Irrigation after making such exparte inquiry and taking such evidence exparte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims, that no claimant for water from said river had any notice whatever of the claim for water filed by others, nor had any claimant, for water from said river, any notice of the opinions of the Secretary of the State Board of Irrigation on the other claims for water from said river; that on

85 the 7th day of April 1897, the State Board of Irrigation without any notice to the claimants of appropriations of water from said river or any of them, and without the knowledge of this cross-petitioner or its grantor, caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of said Board, prior to that date, including the opinion rendered on the claim of this cross-petitioner.

Twelfth. This cross-petitioner further avers that neither it nor its grantor had any notice, knowledge or information concerning the various opinions rendered by said Secretary of the State Board of Irrigation, prior to the 7th day of April 1897, on the claims of others for rights to the use of water from the North Platte River, or any of them, or of the passage of the above mentioned resolution affirming said opinions, and neither this cross-petitioner nor its grantor acquired any knowledge of said action for several years thereafter, nor until shortly prior to the commencement of this action and neither this cross-petitioner nor its grantor had any notice or information that the State Board of Irrigation ever intended to do anything more than make a record of the claim of this cross-petitioner in its office.

Thirteenth. That during each and every month of each and every irrigation season there has been sufficient amount of water flowing down the channel of said river to the headgate of the canal of this cross-petitioner to supply a sufficient quantity of water to be diverted into said canal to irrigate all of the lands above mentioned; that prior to the time said lands were irrigated they were, on account of insufficient moisture and rain-fall desert in character and incapable of producing crops, but since irrigating the same they have become very productive and valuable, and have been brought to a high state of cultivation. That since the application of water to said lands through and by means of said canal they have been used in raising
86 various kinds of vegetables, grains, hay and other crops adapted to the climatic conditions of the country. That some of said lands have been planted to alfalfa and some to shrubbery and trees which are all in good flourishing condition, owing to the fact that they have been irrigated, and it is absolutely necessary

to continue to irrigate the same during the various months of each irrigation season in order to preserve the said crops, trees and shrubbery from ruin and destruction; that without irrigation said lands would become practically valueless and the prosperous homes now located thereon would be destroyed and ruined.

Fourteenth. Cross-petitioner further avers that on or about the 31st day of August 1887, a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the state of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of the said State. That in the spring of 1888, said Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte River at a point on said river in Scotts Bluff County, Nebraska, where the west line of Section 10 Township 25 north, Range 58 west, intersects the north bank thereof for irrigation purposes. That said point of diversion of the Farmers Canal Company is about 30 miles up the river from the headgate of the canal of this cross-petitioner. That said The Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said company ceased work thereon. That at said time there were not more than 1500 acres of land susceptible to irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 1000 or 1200 acres of land. That said company did not again resume

87 work on said canal until the spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the summer of 1893, when it again ceased work on said canal. That when said company ceased work on said canal in 1893, it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about 2500 or 3000 acres of land. That as completed in 1893 there were not more than 2000 acres of land susceptible to irrigation from said canal, and said Company and its grantees never irrigated more than 2000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2000 acres of land. That on or about the 23rd day of December 1901 said canal of the Farmers Canal Company together with all its property, rights and franchises, was sold under a decree of foreclosure to one Roberts Walker, who on or about the 20th day of October 1904, sold and conveyed the same to the Tri-State Land Company, one of the defendants above named, which is a corporation organized and existing under and by virtue of the laws of the state of New Jersey.

Fifteenth. That no further work was done on said canal from the time that The Farmers Canal Company ceased work thereon in the year 1893 until the defendant, The Tri-State Land Company commenced to enlarge and extend the same in September 1906. That said defendant The Tri-State Land Company prosecuted work

thereon from September 1906, until the Fall of 1907, and did enlarge said canal at the headgate and for some distance below the headgate to a width of 90 feet at the bottom and depth of 11 feet, and did extend the same in an easterly direction for a distance of about 40 miles from the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land.

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That prior to the commencement of this action said Tri-State Land Company entered into a contract with The Farmers Mutual Canal Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, whereby said Tri-State Land Company agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal, water rights, appropriations and franchises of said The Tri-State Land Company, and plaintiff is informed and believes and on such information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal together with all water rights, appropriations and franchises acquired by it to said The Farmers Mutual Canal Company receiving in payment therefor all of the capital stock of The Farmers Mutual Canal Company a majority of which said capital stock said Tri-State Land Company still owns and controls. That the Tri-State Land Company and said Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 or 40 miles so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said Companies intend to divert and appropriate water through said canal from the North Platte River, which is the only source of supply of the canal of the said cross-petitioner herein.

Sixteenth. This cross-petitioner further avers on information and belief that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of The Farmers Canal Company to appropriate water from the North Platte River; that thereafter and on or about the 19th day of September 1896, said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska its claim

89 for an appropriation of water from the North Platte River to the extent of 275,000 minors' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres, that thereafter and on or about the 9th day of January 1897 the Secretary of the State Board of Irrigation did render an opinion on said claim and made the same a matter of record in his office in which opinion, he, the said Secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte River in the southwest quarter of the southeast quarter of Section three, township twenty-three north, range fifty-eight west; that said ditch is about eighty-one miles in length; that said ditch or canal covers and re-claims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dated from the 16th day of September 1887. Said opinion further stated that the claim

of said The Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904,

3rd. The amount of the appropriation shall not exceed eleven hundred and forty-two and six-sevenths ($1142\frac{6}{7}$) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one seventieth ($1/70$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

But said opinion contained no finding whatever as to the
90 relative priorities of the various appropriators of water from said stream.

Seventeenth. This cross-petitioner further avers on information and belief that on the 7th day of April 1897, the State Board of Irrigation caused a resolution to be entered on its records affirming the opinion of the Secretary of the State Board of Irrigation on the claim of the Farmers Canal Company above mentioned, and other opinions rendered by said Secretary prior to said date.

Eighteenth. This cross-petitioner further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the said State Board of Irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land; nor any part thereof, except about two thousand acres; that at said time said company had not acquired a right to appropriate $1142\frac{6}{7}$ cubic feet of water per second of time from said river nor any part thereof, except about twenty-eight cubic feet of water per second of time and said opinion and said resolution are erroneous and false in said particulars.

Nineteenth. This cross-petitioner further avers that neither The Central Irrigation District, nor its grantors had any notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon, or inquiry with reference thereto or of the opinion of the Secretary of the State Board of Irrigation thereon, or of the resolution entered upon the records of said Board affirming said opinion; not did this cross-petitioner or its grantor acquire any knowledge

whatever of the above mentioned transaction of said Board
91 and its Secretary for several years after they had taken place; that no copy of said opinion and resolution, or either of them, was ever at any time delivered to this cross-petitioner or to its grantor, or filed in the office of the County Clerk of Scotts Bluff County, Nebraska, nor was any certificate signed by the president of said Board

and attested by the secretary, or otherwise, containing the name or the post-office address of said Company or the priority of its appropriation, or the amount of water appropriated by it, or the amount of prior appropriations or any other information with reference to said claim of said The Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska or to the County Clerk of any other county in said state, nor was any such certificate with reference to the appropriation of this cross-petitioner ever transmitted to the County Clerk of said County or the County Clerk of any other County. That neither this cross-petitioner nor its grantor was given any opportunity whatever of appearing before the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference to said claim of The Farmers Canal Company, and said opinion and resolution are therefore absolutely null and void.

Twentieth. This cross-petitioner further avers that neither The Farmers Canal Company nor its grantees, nor either of them ever appropriated or applied to a beneficial use, prior to the year 1909, more than twenty-eight cubic feet of water per second of time, yet notwithstanding this fact, The Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired, through and under the Farmers Canal Company, a right to appropriate from the North Platte River 1142-6/7 cubic feet of water per second of time with a priority dating from the 16th day of September 1887, and said companies have, through their duly authorized officers and agents, at various times asserted and declared that they have a right

92 of appropriation of water from the North Platte River to the extent of 1142-6/7 cubic feet of water per second of time continually flowing during the irrigation season of each and every year which is prior to the right of appropriation acquired by this cross-petitioner and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the canal of this cross-petitioner for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river.

Twenty-first. This cross-petitioner further avers that during the greater portion of the irrigation season of 1910, said The Tri-State Land Company and The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of twenty-eight cubic feet of water per second, and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of this cross-petitioner much below the quantity of water to which this cross-petitioner was entitled to divert from said river; that notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said Board and notwithstanding the fact that no adjudication was in fact made by said Board of the relative rights of this cross-petitioner and the other parties to this action, yet because of the rendering of the opinion of the above mentioned by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation re-

fused to limit or restrict said Farmers Mutual Canal Company and The Tri-State Land Company, or either of them, in the diversion of water from said stream to twenty-eight cubic feet of water per second of time, or any quantity of water less than 1142-6/7 cubic

feet per second of time, but on the contrary said State Board
93 of Irrigation caused the headgate of the canal of this cross-petitioner to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed The Farmers Mutual Canal Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of 1142-6/7 cubic feet of water per second of time; that during all of the time that the headgate of the canal of this cross-petitioner was closed by the State Board of Irrigation as aforesaid, said Farmers Mutual Canal Company and Tri-State Land Company were diverting several hundred cubic feet of water per second of time from said river, which included 36 cubic feet of water per second of time which this cross-petitioner was entitled to have flow into and through its said canal for the irrigation of land subject to irrigation therefrom.

Twenty-second. This cross-petitioner further avers that to give The Farmers Mutual Canal Company or its grantors a priority over the cross-petitioner herein to the use of water to the extent of 1142-6/7 cubic feet of water per second of time would be to deprive this cross-petitioner and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution above referred to constitute a cloud on this cross-petitioner's title to an appropriation of water from said stream, and unless said cloud is cleared by a decree of this court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant this cross-petitioner or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of said stream by The Farmers Mutual Canal Company and the Tri-State Land Company, and will permit said Company to divert all of the water of said stream during times of scarcity to the entire exclusion
of this cross-petitioner and the users of water from its canal.

94 Twenty-third. That the average flow of water in said river at or near the headgate of the canal of this cross-petitioner and that of the defendants The Farmers Mutual Canal Company and The Tri-State Land Company during part of July and during all of the months of August, September, October and November has been for several years last past, and will be in the future, much less than the amount of water which said defendants The Farmers Mutual Canal Company and the Tri-State Land Company claim a right to divert and appropriate prior to the right of this cross-petitioner and if said companies be permitted to divert 1142-6/7 cubic feet of water per second of time prior to the cross-petitioner herein the said cross-petitioner and the users of water from its said canal will be deprived of the use of water for irrigation purposes during the latter part of the month of July and during the months of August, September, October and November of each and every year,

to the irreparable damage and injury of said cross-petitioner and the users of water from its canal.

Twenty-fourth. This cross-petitioner further avers that the claim of The Farmers Mutual Canal and the Tri-State Land Company to the right to appropriate 1142-6/7 cubic feet of water per second of time from the North Platte River during each and every irrigation season is unfounded in truth and in fact; that neither the Farmers Mutual Canal Company, The Tri-State Land Company, nor its grantors, nor either of them, ever acquired a right to appropriate from said river any amount of water whatsoever except a sufficient amount to irrigate about 2000 acres of land, or 28 cubic feet of water per second of time, continuously flowing during each irrigation season. That all rights of appropriation acquired by said Companies, or either of them, are subsequent junior and inferior to the right of appropriation of water from said river acquired by this cross-petitioner. That if said The Tri-State Land Company or The Farmers Mutual

95 Canal Company ever did, by virtue of any proceedings taken by said company or its grantors or either of them, or otherwise initiate a right of appropriation which, upon application to a beneficial use, would ripen into a right to appropriate water from said river, said rights so initiated, if any, have become lost to said The Farmers Mutual Canal Company and its grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged rights, if any right was in any manner ever initiated or acquired by said company or its grantors.

Twenty-fifth. This cross-petitioner further avers that in order to determine how much water the defendants, The Tri-State Land Company, The Farmers Mutual Canal Company, The Mitchell Irrigation District, and The Gering Irrigation District, should permit to flow down the channel of said river to the headgate of the canal of this cross-petitioner, it will be necessary to determine the quantity of water, if any, that this cross-petitioner may be compelled to permit to flow down the channel of said river to the headgates of the canals of the other defendants herein and to judicially determine the relative rights of priority of all of the parties to this action.

Wherefore this cross-petitioner prays:

1. That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired to appropriate from said river and the relative priorities of said rights of appropriation.

(2.) That it be adjudged and decreed that this cross-petitioner has acquired a right of appropriation of water from the North Platte River to the extent of 36 cubic feet of water per second of time, continuously flowing during each and every irrigation season, with a priority dating from the 23rd day of June 1890, and that said right

96 is prior in time and prior in right to the rights of appropriation of the other parties to this action and each of them, and that the title to said right of appropriation of this cross-petitioner be quieted and confirmed in this cross-petitioner as against the other parties to this action and each of them, and that the

cloud cast on cross-petitioner's title by reason of the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board confirming said opinion be removed.

3. That the defendants The Farmers Mutual Canal Company The Tri-State Land Company, The Mitchell Irrigation District, and The Gering Irrigation District, and each of them, be enjoined and restrained from decreasing or diminishing the flow of water in said river at the headgate of the canal of the cross-petitioner herein below the amount of water which said cross-petitioner has acquired a right to appropriate, to-wit: 36 cubic feet of water per second of time, continually flowing during each and every irrigation season, and the amount of water, if any, which it may be adjudged and decreed that the cross-petitioner herein shall permit to flow down the channel of said river past its headgate.

4. That the cross-petitioner herein be granted such other and further relief as may be just and equitable.

5. That this cross-petitioner have and recover judgment for the costs of this action.

THE CENTRAL IRRIGATION DISTRICT,
By MORROW & MORROW.

STATE OF NEBRASKA,
County of Scottsbluff, ss:

L. L. Miller being first duly sworn deposes and says that he is the Secretary of The Central Irrigation District, the cross-petitioner herein, that he has read the foregoing answer and cross-petition and knows the contents thereof, and that the facts therein stated
97 are true as he verily believes.

L. L. MILLER.

Subscribed in my presence and sworn to before me this 15th day of October A. D. 1910.

[SEAL.]

M. H. McHENRY,
Clerk Dist. Court,
By L. O. McHENRY, Deputy.

And afterwards on the 22nd day of November, 1910, there was filed in the office of said Clerk an Amended and Supplemental cross-petition of the Ramshorn Ditch Company in the words and figures following, to-wit:

In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

VS.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Copartnership under the Firm-name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemental Cross-petition.

98 Comes now the above named defendant, The Ramshorn Ditch Company, and for answer to the amended and supplemental petition of the plaintiff herein alleges:

First. This defendant admits the allegations contained in paragraphs one to nine inclusive, eleven to twenty-one inclusive, twenty-three to twenty-six inclusive, and twenty-eight of said amended and supplemental petition, and all other allegations in said amended and supplemental petition contained that are hereafter affirmatively set out in the cross-petition of this defendant; this defendant denies each and every other allegation in said amended and supplemental petition contained, except such allegations as are hereinafter admitted or qualified.

Amended and Supplemental Cross-petition.

For its amended and supplemental cross-petition against the plaintiff and the other defendants to this action, this defendant, for and on behalf of itself and the users of water from its canal hereinafter described, alleges:

First. That at all times hereinafter mentioned The Ramshorn Ditch Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

Second. That on or about the 24th day of March 1893 Yorick Nichols and Carroll Nichols posted a notice on the North bank of the North Platte River in the northeast corner of Section 24, Township 23 north, Range 58 West of the 6th P. M. in Scottsbluff County, Nebraska, of their intention to appropriate and divert a sufficient supply of water from said River at said point to fill a ditch 20 feet wide at the top and 16 feet wide at the bottom, and 5 feet 16 inches

deep at the headgate; said water to be conducted through said ditch in an easterly direction down the valley of the North Platte River for a distance of about six and one-half miles, for irrigation and other useful and beneficial purposes, and on the 24th day

99 of March 1893 said notice was filed for record in the office of the County Clerk and Recorder of Scottsbluff County, Nebraska and recorded in Volume 1 of Irrigation Records on page 146.

Third. That on or about the first day of April 1893, said Yorick Nichols and Carroll Nichols commenced the construction of said canal and prosecuted the same diligently and uninterruptedly until the first day of April 1894, at which time said canal was completed for a distance of about six and one-half miles.

That the dimensions of said canal were as follows: 7 feet deep immediately below the headgate, 16 feet wide on the bottom, 30 feet wide on the top, with a grade of 2 feet per mile; at 6000 feet below the headgate 4 feet deep, 16 feet wide on the bottom 24 feet wide on top, with a grade of two feet per mile; at 14,000 feet below the headgate 2 feet deep, 12 feet wide on the bottom, 16 feet wide on top, with a grade of 2 feet per mile; at 19,000 feet below the headgate 2 feet deep, 10 feet wide on the bottom, 14 feet wide on top, with a grade of 5 feet per mile; at 22,000 feet below the headgate 2 feet deep, 8 feet wide on the bottom, 12 feet wide on top, with a grade of 3 feet per mile; at $6\frac{1}{2}$ miles below the headgate $1\frac{1}{2}$ feet deep, 6 feet wide on the bottom, 9 feet wide on top, with a grade of 3 feet per mile.

That said canal passes through the following described lands, to-wit: Sections 18, 19, 20, 21, 22 and 14 in Township 23 north, Range 57 west of the 6th P. M.

That the carrying capacity of said canal at and immediately below the headgate is more than 45-5/7 cubic feet per second of time.

Fourth. That thereafter said Carroll Nichols and Yorick Nichols conveyed said canal together with the right of appropriation of water from the North Platte River acquired by them, together with all their water rights, privileges and easements appurtenant 100 thereto, to the Ramshorn Ditch Company, which has ever since been and now is the owner of the same.

Fifth. That in April 1894 water was conducted through said canal from the North Platte River to the land subject to irrigation therefrom, said land being the place of intended use of said water: that about 800 acres of land was irrigated from said canal during said year and during each and every year thereafter the amount of water conducted through said canal and the amount of land irrigated therefrom had been increased until the year 1899, when all the land subject to irrigation therefrom had been irrigated and reclaimed and all of said lands have been irrigated from said canal during each and every year subsequent to the year 1899. Said lands are described as follows:

The N. E. $\frac{1}{4}$ of Section 19, the N. W. $\frac{1}{4}$ of Section 20; the S. $\frac{1}{2}$ of Section 21; part of the N. E. $\frac{1}{4}$ of Section 21; the S. $\frac{1}{2}$ of Section 22 all of Sections 23 and 24; part of the S. $\frac{1}{2}$ of Section 14; and part of the S. $\frac{1}{2}$ of Section 13; all in Township 23 north,

Range 57 west of the 6th P. M. and all other lands located between said canal and the North Platte River in Scottsbluff County, Nebraska.

Sixth. That by virtue of the performance of the acts above enumerated by said The Ramshorn Ditch Company and its grantors said The Ramshorn Ditch Company has acquired and is now the owner of the right to appropriate from the North Platte River a sufficient quantity of water for the irrigation of the above described lands, to-wit: 45-5/7 cubic feet of water per second of time, continually flowing during each and every irrigation season, with a priority dating from the date of posting the notice above mentioned, to-wit, the 20th day of March 1893.

Seventh. This cross-petitioner further avers that on or about the 31st day of May 1895, a transcript of the above mentioned notice was made by the County Clerk of Scotts Bluff County, Nebraska and

transmitted to and filed in the office of the Secretary of the
101 State Board of Irrigation of the state of Nebraska; that thereafter the Secretary of the State Board of Irrigation forwarded to The Ramshorn Ditch Company a blank "Claim for the Water of the State of Nebraska," to be filled out giving the information therein required regarding the claim of said company to the use of water from the North Platte River; that said blank was filled out by one Carroll Nichols, president of said Company, and by him returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 6th day of October 1895; that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation made certain inquiry and took certain evidence regarding the claim of The Ramshorn Ditch Company; that on the 7th day of January 1897, the said Secretary of the State Board of Irrigation rendered an opinion on said claim and made the same a matter of record in his office, in which opinion the said Secretary of the State Board of Irrigation found and determined that The Ramshorn Ditch Company and its grantors had constructed a ditch or canal as stated in this cross-petition; that said ditch or canal covers and re-claims the lands herein described and the priority of the appropriation of said The Ramshorn Ditch Company dated from the 20th day of March 1893, when the notice of appropriation was posted at the proposed point of diversion.

Eighth. This cross-petitioner further avers that said opinion of the Secretary of the State Board of Irrigation contained no finding whatever regarding any other appropriation or claim for the use of water from said stream, nor did said opinion determine or find that any other person, company, corporation or party was entitled to appropriate any water whatever from said stream, either prior or subsequent to said The Ramshorn Ditch Company, nor did said opinion contain any finding whatever as to the relative priorities of the various appropriators of water from said stream; that said The Ramshorn

Ditch Company had no notice that any person, company
102 or corporation claimed the right to appropriate water from said stream prior to the said Ramshorn Ditch Company.

Ninth. This cross-petitioner further avers on information and

belief that several other claimants for the use of water from the North Platte River had, prior to the 7th day of April 1897, filed with the Secretary of the State Board of Irrigation of the State of Nebraska their respective claims for the use of water from the North Platte River; that the State Board of Irrigation after making such ex parte inquiry and taking such evidence ex parte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims; that no claimant for water from said river had any notice whatever of the claims for water filed by others, nor had any claimant, for water from said river any notice of the opinions of the Secretary of the State Board of Irrigation on the other claims for water from said river; that on the 7th day of April 1897, the State Board of Irrigation, without any notice to the claimants of appropriations of water from said river or any of them, and without the knowledge of this cross-petitioner or its grantor, caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of said Board, prior to that date, including the opinion rendered on the claim of this cross-petitioner.

Tenth. This cross-petitioner further avers that neither it nor its grantor had any notice, knowledge or information concerning the various opinions rendered by said Secretary of the State Board of Irrigation, prior to the 7th day of April 1897, on the claims of others for rights to the use of water from the North Platte River, or any of them, or of the passage of the above mentioned resolution affirming said opinions, and neither this cross-petitioner nor its grantor acquired any knowledge of said action for several years thereafter, nor until shortly prior to the commencement of this
103 action and neither this cross-petitioner nor its grantor had any notice or information that the State Board of Irrigation ever intended to do anything more than make a record of the claim of this cross-petitioner in its office.

Eleventh. That during each and every month of each and every irrigation season there has been a sufficient quantity of water flowing down the channel of said river to the headgate of the canal of this defendant to supply a sufficient quantity of water to be diverted into said canal to irrigate all of said lands above described; that prior to the time said lands were irrigated, they were, on account, of insufficient moisture and rain fall, desert in character and incapable of producing crops, but since the application of water to said lands through and by means of said canal they have been used in raising various kinds of vegetables, grains, hay and other crops adapted to the climatic conditions of the country. That some of said lands have been planted to alfalfa and some to shrubbery and trees, which are all in a good flourishing condition, owing to the fact that they have been irrigated, and it is absolutely necessary to continue to irrigate the same during the various months of each irrigation season in order to preserve said crops, trees and shrubbery from ruin and destruction; that without irrigation said lands would become practically valueless and the prosperous homes now located thereon would be destroyed and ruined.

Twelfth. This cross-petitioner further avers that on or about the

31st day of August 1887, a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the state of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of the state of Nebraska. That in the Spring of 1888, said The Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte

104 River at a point On said river in Scotts Bluff County, Nebraska, where the west line of Section 10, Township 23 north, Rnage 58 west, intersects the north bank thereof, for irrigation purposes. That said point of diversion of the canal of The Farmers Canal Company is about 40 miles up the river from the headgate of the canal of this cross-petitioner. That said The Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said Company ceased work thereon. That at said time there was not more than 1500 acres of land susceptible to irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 1000 or 1200 acres of land. That said Company did not again resume work on said canal until the spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the Summer of 1893, when it again ceased work on said canal. That when said Company ceased work on said canal in 1893 it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about 2500 to 3000 acres of land. That as completed in 1893 there were not more than 2000 acres of land susceptible of irrigation from said company and its grantees never irrigated more than 2000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than said 2000 acres of land. That on or about the 23rd day of December 1901, said canal of The Farmers Canal Company, together with all its property rights and franchises, was sold under a decree of foreclosure to one Roberts Walker, who, on or about the 20th day of October 1904, sold and conveyed the same to The Tri-State Land Company, one of the defendants above named, which is a
105 corporation organized and existing under and by virtue of the laws of the state of New Jersey.

Thirteenth. That no further work was done on said canal from the time that The Farmers Canal Company ceased work thereon in the year 1893 until the defendant, The Tri-State Land Company, commenced to enlarge and extend the same in September 1906. That said defendant, The Tri-State Land Company prosecuted work thereon from September 1906 until the Fall of 1907, and did enlarge said canal at the headgate and for some distance below the headgate to a width of 90 feet at the bottom and a depth of 11 feet, and did extend the same in an easterly direction for a

distance of about 40 miles from the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land.

That prior to the commencement of this action said Tri-State Land Company entered into a contract with The Farmers Mutual Canal Company, a corporation organized under the laws of the State of Nebraska, whereby said Tri-State Land Company agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal, water-rights, appropriations and franchises of said The Tri-State Land Company, and plaintiff is informed and believes and on such information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal together with all water rights, appropriations and franchises acquired by it to said The Farmers Mutual Canal Company receiving in payment therefor all of the capital stock of The Farmers Mutual Canal Company a majority of which said capital stock said Tri-State Land Company still owns and controls. That Tri-State Land Company and said Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 to 40 miles so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said Companies intend to divert and appropriate water through said canal from the North Platte River which is the only source of supply of the canal of the said cross-petitioner herein.

106 Fourteenth. This cross-petitioner further avers on information and belief that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of The Farmers Canal Company to appropriate water from the North Platte River: that thereafter and on or about the 19th day of September 1896, said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska its claim for an appropriation of water from the North Platte River to the extent of 275,000 minors' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres; that thereafter and on or about the 9th day of January 1897 the Secretary of the State Board of Irrigation did render an opinion on said claim and made the same a matter of record in his office, in which opinion, he, the said Secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte River in the southwest quarter of the southeast quarter of section three, township twenty-three north, range fifty-eight west; that said ditch is about eighty-one miles in length; that said ditch or canal covers and re-claims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dated from the 16th day of September 1887. Said opinion further stated that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd. The amount of the appropriation shall not exceed eleven hundred forty-two and six-sevenths ($1142\frac{6}{7}$) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may
107 hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances shall be limited to one-seventieth ($1/70$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

But said opinion contained no finding whatever as to the relative priorities of the various appropriators of water from said stream.

Fifteenth. This cross-petitioner further avers on information and belief that on the 7th day of April 1897, the State Board of Irrigation, without any notice whatsoever to this cross-petitioner or the other claimants for rights to the use of water from the North Platte River and without their knowledge, caused a resolution to be entered on its records affirming the opinion of the Secretary of the State Board of Irrigation on the claim of the Farmers Canal Company above mentioned, and other opinions rendered by said Secretary prior to said date.

Sixteenth. This cross-petitioner further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the said State Board of Irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land, nor any part thereof, except about two thousand acres; that at said time said company had not acquired a right to appropriate $1142\frac{6}{7}$ cubic feet of water per second of time from said river nor any part thereof, except
about twenty-eight cubic feet of water per second of time;
108 and said opinion and said resolution are erroneous and false in said particulars.

Seventeenth. This cross-petitioner further avers that neither The Ramshorn Ditch Company nor its grantor, had any notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon, or inquiry with reference thereto, or of the opinion of the Secretary of the State Board of Irrigation thereon, or of the resolution entered upon the records of said Board affirming said opinion; nor did this cross-petitioner or its grantor acquire any knowledge whatever of the above mentioned transactions of said Board and its Secretary for several years after they had taken place; that no copy of said opinion and resolution, or either of them, was ever at any time delivered to this cross-petitioner or to its grantor, or filed in the office of the County Clerk of Scotts Bluff County, Nebraska; nor was any certificate signed by the president of

said Board and attested by the Secretary, or otherwise, or the priority of its appropriation, or the amount of water appropriated by it, or the amount of prior appropriations or any other information with reference to said claim of said The Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska, or to the County Clerk of any other County in said state, nor was any such certificate with reference to the appropriation of this cross-petitioner ever transmitted to the County Clerk of said County or to the County Clerk of any other County. That neither this cross-petitioner nor its grantor was given any opportunity whatever of appearing before the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference to said claim of The Farmers Canal Company, and said opinion and resolution are therefore absolutely null and void.

Eighteenth. This cross-petitioner further avers that neither The Farmers Canal Company nor its grantees, nor either of them, ever appropriated or applied to a beneficial use, prior to year 1909, more *that* twenty-eight cubic feet of water per second of time, *yet* notwithstanding this fact, The Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired through and under the Farmers Canal Company, a right to appropriate from the North Platte River 1142-6/7 cubic feet of water per second of time with a priority dating from the 16th day of September 1887 and said Companies have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte River to the extent of 1142-6/7 cubic feet per second of time, continually flowing during the irrigation season of each and every year which is prior to the right of appropriation acquired by this cross-petitioner and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the canal of this cross-petitioner for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river, and will do so unless restrained by an order of decree of this Court.

Nineteenth. This cross-petitioner further avers that during the greater portion of the irrigation season of 1910 said The Tri-State Land Company and The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of twenty-eight cubic feet of water per second, and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of this cross-petitioner much below the quantity of water to which this cross-petitioner was entitled to divert from said river; that notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the law creating said Board and notwithstanding the fact that no adjudication was in fact made by said Board of the relative rights of this cross-petitioner and the other parties to this action, yet because of the rendering of the opinion above mentioned by the Secretary of the State Board of Irrigation and the

passage of the resolution above mentioned, said State Board of Irrigation refused to limit or restrict said Farmers Mutual Canal Company and The Tri-State Land Company, or either of them, in the diversion of water from said stream to twenty-eight cubic feet of water per second of time, or to any quantity less than $1142\frac{6}{7}$ cubic feet per second of time, but on the contrary said State Board of Irrigation caused the headgate of the canal of this cross-petitioner to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed The Farmers Mutual Canal Company and The Tri-State Land Company to divert as much water from said river as they desired to the extent of $1142\frac{6}{7}$ cubic feet of water per second of time; that during all of the time that the headgate of the canal of this cross-petitioner was closed by the State Board of Irrigation as aforesaid, said Farmers Mutual Canal Company and Tri-State Land Company were diverting several hundred cubic feet of water per second of time from said river, which included $45\frac{5}{7}$ cubic feet of water per second of time which this cross-petitioner was entitled to have flow into and through its said canal for the irrigation of land subject to irrigation therefrom.

Twentieth. This cross-petitioner further avers that to give The Farmers Mutual Canal Company or its grantors a priority over the cross-petitioner to the use of water to the extent of $1142\frac{6}{7}$ cubic feet of water per second of time would be to deprive this cross-petitioner and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution above referred to constitute a cloud on this cross-petitioner's title to an appropriation of water from said stream and unless said cloud is

111 cleared by a decree of this Court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant this cross-petitioner or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of said stream by The Farmers Mutual Canal Company and the Tri-State Land Company, and will permit said Companies to divert all of the water of said stream during times of scarcity to the entire exclusion of this cross-petitioner and the users of water from its canal.

Twenty-first. That the average flow of water in said river at or near the headgate of the canal of this cross-petitioner and that of the defendants The Farmers Mutual Canal Company and The Tri-State Land Company during part of July and during all of the months of August, September, October and November has been for several years last past, and will be in the future, much less than the amount of water which said defendants The Farmers Mutual Canal Company and The Tri-State Land Company claim a right to divert and appropriate prior to the right of this cross-petitioner and if said companies be permitted to divert $1142\frac{6}{7}$ cubic feet of water per second of time prior to the cross petitioner herein the said cross-petitioner and the users of water from its said canal will be deprived of the use of water for irrigation purposes during the latter part

of the month of July and during the months of August, September, October and November of each and every year, to the irreparable damage and injury of said cross-petitioner and the users of water from its canal.

Twenty-second. This cross-petitioner further avers that the claim of the Farmers Mutual Canal Company and The Tri-State Land Company to the right to appropriate 1142-6/7 cubic feet of water per second of time from the North Platte River during each and every irrigation season is unfounded in truth and in fact; that neither the Farmers Mutual Canal Company, The Tri-State Land

Company nor its grantors, nor either of them, ever acquired
112 a right to appropriate from said river any amount of water whatsoever except a sufficient amount to irrigate about 2000 acres of land, or 28 cubic feet of water per second of time, continuously flowing during each irrigation season. That all rights of appropriation acquired by said companies and their grantors to appropriate water from the North Platte River, if any rights were acquired by said Companies, or either of them, are subsequent, junior and inferior to the right of appropriation of water from said river acquired by this cross-petitioner. That if said The Tri-State Land Company or The Farmers Mutual Canal Company ever did, by virtue of any proceedings taken by said company or its grantors, or either of them, or otherwise initiate a right of appropriation which, upon application to a beneficial use, would ripen into a right to appropriate water from said river, said rights so initiated, if any, have become lost to said The Farmers Mutual Canal Company and its grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged right, if any right was in any manner ever initiated or acquired by said companies or its grantors.

Twenty-third. This cross-petitioner further avers that in order to determine how much water the defendants The Tri-State Land Company, The Farmers Mutual Canal Company, The Mitchell Irrigation District, and The Gering Irrigation District, should permit to flow down the channel of said river to the headgate of the canal of this cross-petitioner, it will be necessary to determine the quantity of water, if any, that this cross-petitioner may be compelled to permit to flow down the channel of said river to the headgates of the canals of the other defendants herein and to judicially determine the relative rights of priority of all of the parties to this action.

113 Wherefore this cross-petitioner prays:

1. That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired a right to appropriate from said river and the relative priorities of said rights of appropriation.

2. That it be adjudged and decreed that this cross-petitioner has acquired a right of appropriation of water from the North Platte River to the extent of 45-5/7 cubic feet per second of time, continuously flowing during each and every irrigation season, with a priority dating from the 20th day of March 1893, and that said right

is prior in time and prior in right to the rights of appropriation of the other parties to this action and each of them, and that the title to said right of appropriation of this cross-petitioner be quieted and confirmed in this cross-petitioner as against the other parties to this action and each of them, and that the cloud cast on cross-petitioner's title be reason of the opinion of the Secretary of the State Board of Irrigation and the Resolution of said Board confirming said opinion be removed.

3. That the defendants The Farmers Mutual Canal Company, The Tri-State Land Company, The Mitchell Irrigation District and the Gering Irrigation District, and each of them, be enjoined and restrained from decreasing or diminishing the flow of water in said river at the headgate of the canal of this cross-petitioner below the amount of water which said cross-petitioner has acquired a right to appropriate, to-wit, 45-5/7 cubic feet per second of time, continuously flowing during each and every irrigation season, and the amount of water, if any, which it may be adjudged and decreed that the cross-petitioner herein shall permit to flow down the channel of said river past its headgate.

4. That the cross-petitioner herein be granted such other 114 and further relief as may be just and equitable.

5. That this cross-petitioner have and recover judgement for cost of this action.

THE RAMSHORN DITCH COMPANY,

By — — —, *Its Attorneys.*

STATE OF NEBRASKA,

County of Scotts Bluff, ss:

A. F. Riddle being first duly sworn deposes and says that he is the President of The Ramshorn Ditch Company, the cross-petitioner above named; that he has read the foregoing answer and cross-petitioner and knows the contents thereof, and that the facts therein stated are true as he verily believes.

A. F. RIDDLE.

Subscribed in my presence and sworn to before me this 15 day of October A. D. 1910.

My commission expires Jan. 25th, 1915.

JOHN BOATSMAN,
Notary Public.

And afterwards, on the 25th day of November, 1910, there was filed in the office of said Clerk an answer and cross-petition of the Browns Creek Irrigation Company, in the words and figures following, to-wit:

115 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigation Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-partnership under the Firm Name of The Lucerne Land Company, Defendants.

Answer and Cross-petition of Browns Creek Irrigation Company.

Comes now the Browns Creek Irrigation Company, defendant herein, and for its answer to the petition of the plaintiff alleges:

1. This defendant admits the allegations in paragraphs 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, and 30.

2. And this defendant further answering said petition alleges that it has no knowledge or information whereon to form a belief as to the truth of the allegations contained in paragraphs 6 and 7, and therefore demies the same.

Cross-petition.

And this defendant for its cross petition against the plaintiff herein and its co-defendants in this action and in behalf of itself and the users of water from its canal hereinafter described
116 alleges:

1. That prior to the 25th day of June 1891 this defendant Browns Creek Irrigation Company was a corporation duly organized and existing under the laws of the state of Nebraska and that on said date one Michael Elsass, was its president, and that on said date said Michael Elsass, as president of this answering defendant, posted a notice at a point on the north bank of the North Platte river on the N. W. $\frac{1}{4}$ of Sec. 28, Twp. 20, north range 50 in Cheyenne County, Nebr. of its intentions to divert and appropriate a sufficient quantity of water from said river from said point to fill a canal $57\frac{1}{2}$ ft. in width at the bottom and $2\frac{3}{4}$ ft. in depth said water to be conducted in an easterly direction down the valley of the North Platte river for irrigation and other useful and beneficial purposes, and which said notice was on the 25th day of June 1891 filed in the office of the Clerk of Cheyenne County Nebraska and

recorded in the miscellaneous records of said County, and that this answering defendant is now and at all times heretofore stated been a corporation organized as aforesaid.

2. That immediately after posting said notice at said point of diversion this answering defendant commenced to construct the said canal and prosecuted the same diligently and uninterruptedly to completion. That on and prior to the 24th day of June 1895 was completed to its full capacity, to-wit, at one-half mile below the head-gate fifty feet in width and three feet in depth; at eight miles below the headgate fifteen feet in width and three feet in depth; at twelve miles below the head-gate twelve feet in width and three feet in depth; at sixteen miles below the head-gate ten feet in width and three feet in depth; and at twenty feet below the headgate eight feet in width and three feet in depth, with a two foot grade per mile through the length of this ditch, and that the carrying capacity of said canal at immediately below the headgate is more than 190 cu. ft. of water per second of time.

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3. That on the 23rd day of June 1893 this defendant commenced to conduct water through its said canal from the North Platte river for the irrigation of lands subject to be irrigated therefrom, said lands being the place of intended use of said water. That a small amount of land was irrigated from said canal during said year and during each and every year thereafter the amount of water conducted through said canal by said company and the amount of land irrigated therefrom has been increased until the present time when there is now irrigated and reclaimed from said canal approximately 10,000 acres and 4,000 acres is susceptible to irrigation to which water has not been applied at this time but which this defendant is ready and able to supply at any time it may be demanded so to do, and that said lands so irrigated as aforesaid have been irrigated each and every year since water was first applied thereto. That said lands so irrigated as aforesaid and susceptible of being irrigated as aforesaid are described as follows, to-wit: parts of Sections 28, 27, and 35 in Twp. 20 N. of Range 50 west of the 6th P. M. Parts of Sections 1 and 2 Twp. 19 Range 50 west; parts of the north half of Sections 6 and 9 and parts of sections 4, 3, 10, 11, 15, 14, 12, 13, 24, in Twp. 19 Rng. 49 west; Secs. 18, 19, 17, 20, 9, 16, 21, 28, 10, 15, 22, 27, 34, 14, 23, 26, 35, 24, 25, 36, in Twp. 19 Rng. 48 west, amounting in all to about 14,000 acres. That said lands are all located between the North Platte river and the canal of this defendant, formerly in Cheyenne County and now in Morrill County, Nebraska, and require 190 cu. ft. of water per second of time for the irrigation thereof.

4. That by virtue of the performance of the acts above enumerated, by this defendant, Browns Creek Irrigation Company, it and the owners of land subject to irrigation from its canal have acquired and now own the right to appropriate and divert from the North Platte river, a sufficient quantity of water for the irrigation of the above described lands, to-wit: 190 cu. ft. per second of time continuously flowing during each and every irrigating season with a priority dating from the date of the posting of the notice above mentioned, to-wit, June 25, 1891.

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5. Defendant further alleges that on or about the 15th day of May 1895 the County Clerk of Cheyenne County, Nebr., made a transcript of the notice above described with the proof of posting same, and transferred the same to the office of the Secretary of the State Board of Irrigation, of the state of Nebraska, and said transcript of said notice was filed by said Secretary of the State Board of Irrigation in his office on the 15th day of May 1895. That thereafter the Secretary of the State Board of Irrigation forwarded to this defendant, Browns Creek Irrigation company a blank "Claim for the waters of the State of Nebraska" to be filled out, giving the information therein required regarding the claim of said company to the use of water from the North Platte river. That said blank was filled out by said Michael Elsass, as the president of said corporation, and was returned to the office of the Secretary of the State Board of Irrigation and filed in said office June 24th 1895. That on or about July 14th 1896 the secretary of the State Board of Irrigations made certain inquiries and took certain evidence regarding the claim of this defendant to waters from the North Platte river, and that on the 28th day of Jan. 1897 the said Secretary of the State Board of Irrigation rendered an opinion on said claim and made the same a matter of record in his office, in which opinion said Secretary found and determined that this defendant company had completed a ditch or canal as stated in said claim affidavit; that said ditch or canal covered and reclaimed the lands herein described, and that the priority of this defendant dated from the 20th day of Jan. 1892 and that the amount of said appropriation was 188-5/7 cu. ft. of water per second of time.

6. This defendant further avers that said opinion of the Secretary of State Board of Irrigation contained no finding whatsoever regarding any other appropriation or claim for the use of water from said stream, nor did said opinion determine or find
119 that any other persons, company, corporation or party was entitled to appropriate any water whatsoever from said stream either prior to or subsequent to this defendant; nor did said opinion contain any finding what-so-ever as to the relative priority or the various appropriators of water from said stream, and that this defendant had no notice that any person, company or corporation claimed the right to appropriate water from said stream prior to that of this defendant.

7. This defendant further avers on information and belief that several other claimants for the use of water from the North Platte river had prior to the 28th day of Jan. 1897 filed with the Secretary of the State Board of Irrigation their respective claims to appropriate water from the North Platte river, and the Secretary of the State Board of Irrigation, after making ex party inquiries and taking such evidence ex-party as he deemed necessary and advisable on each of said claims, rendered an opinion on each of said claims. And the defendant alleges that no claimant for water from said river had any notice what-so-ever of the claims for water filed by other claimants, nor had any claimant for water from said river any notice of the opinion of the Secretary on other claims for water from said river.

That on the 7th day of April 1897 the State Board of Irrigation without any notice to this defendant and without the knoweldge of this defendant caused a resolution to be entered upon its records affirming all opinions rendered by the Secretary of the State Board of Irrigation prior to that day including the opinion rendered on the claim of this defendant. And this defendant alleges that no notice was served on this defendant that the Secretary of the State Board of Irrigation proposed to enter such order proceeding to adjudicate the rights of this defendant to the use of the water of the North Platte river or to establish a priority between the users of water from such
120 river. And this defendant further avers that it had no notice or knowledge of the various opinions rendered by the Secretary of the State board of Irrigation prior to the 7th day of April 1897 on the claims of others of their right to the use of water from the North Platte river, or of the date of their priorities or any of these of of the passage of the above mentioned resolution, affirming said opinions, and that this defendant did not know of said action of said State Board for several years thereafter, nor until shortly prior to the commencement of this action, and that this defendant had no knowledge or notice or information that the State Board of Irrigation ever intended to do anything more than make a record of the claim of this defendant. And this defendant alleges that the blank sent out by said Secretary of the State Board of Irrigation did not indicate or inform this defendant that the Secretary of the State Board intended to adjudicate and determine the amount of the appropriation or the priority of the appropriation between claimants, but only to obtain from each claimant the time of posting its notice as aforesaid and of the amount of work performed by each claimant on the irrigation canal proposed to be constructed by them and of the amount of water claimed under the rights so acquired.

8. This defendant further avers that during each and every month of each and every irrigating season since water was first turned into its said canal with the exception of a short time during low water of such seasons there has been a sufficient quantity of water flowing down the channel of said river above the headgate of the canal of this defendant to supply a sufficient quantity of water to be diverted into said channel to irrigate all of said lands. That prior to the time said lands were irrigated they were on account of insufficient moisture and rainfall desert in character and incapable of producing crops, but since water has been conducted thereon by this defendant they
121 have been very productive and valuable and have been brought to a high state of cultivation, and have been used in raising various kinds of vegetables, hay and other crops adapted to the climatic conditions of the country: that some of said land has been planted to alfalfa and some to shrubbery, trees and orchards, whcih are all in good flourishing condition owing to the fact that they have been irrigated. That it is necessary to continue to irrigate the same during the various months of the irrigating season of each and every year in order to preserve said crops, shrubbery and orchard- from destruction by drouth. That without irrigation said lands would become practically valueless, and the homes of the owners located thereon would be ruined and destroyed.

9. Defendant further alleges that on or about the 31st day of Aug. 1887 a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the state of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of the said State. That in the spring of 1889 said The Farmers Canal Company — to construct a canal for the purpose of diverting water from the North Platte river at a point on said river in Scotts Bluff County where the west line of Section 10, Twp. 23, Rng. 58 west intersects the north bank thereof, for irrigation purposes. That said Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about 10 miles when said company ceased work thereon. That at said time there was not more than 15,000 acres of land susceptible of irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 10,000 to 12,000 acres of land. That said company did not again assume work on said canal until the spring of 1892 at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the summer of 1893 when it again ceased work on said canal.

122 when said company ceased work on said canal in 1893 it had constructed the same for a distance of about fifteen miles from the head-gate thereof, with a capacity sufficient to irrigate from about 2,500 to 3,000 acres of land. That as completed in 1893 there were not more than 2,000 acres of land susceptible of irrigation from said canal. That said company and its guarantees never irrigated more than 2,000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than said 2,000 acres of land. That on or about the 23rd day of Dec., 1901 said canal of The Farmers Canal Company, together with all of its property, rights and franchises, was sold under a decree of foreclosure to one, Ribert Walker, who, on or about the 20th day of Oct. 1904 sold and conveyed the same to The Tri-State Land Company, one of the defendants herein, which is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

10. That no work was done on said canal from the time that The Farmers Canal Company ceased work thereon in the year 1893 until the defendant. The Tri-State Land Company, commenced to enlarge and extend the same, which this defendant alleges was in September 1906. That said defendant, The Tri-State Land Company prosecuted work thereon from September 1906 until the fall of 1907, and did enlarge said canal at the headgate to a width of 90 feet at the bottom and a depth of 11 feet, and did extend the same in an easterly direction from a distance of about 40 miles from the headgate thereof, so as to make it capable of irrigating 40,000 acres of land. That prior to the commencement of this action said The Tri-State Land Company entered into a contract with The Farmers Mutual Canal Company, a corporation organized under the laws of

123 the state of Nebraska, whereby said The Tri-State Land Company agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal, water rights, appropriation and franchises of said The Tri-State Land Company, and defendant is informed and believes and on such information and belief alleges the fact to be that since the making of said contract said Tri-State Land Company has conveyed said canal, together with all water rights, appropriations and franchises, acquired by it to the said The Farmers Mutual Canal Company, receiving in payment there-for all of the Capital stock of The Farmers Mutual Canal Company, a majority of which said capital stock said Tri-State Land Company still owns and controls. That said The Tri-State Land Company and said The Farmers Mutual Canal Company are now preparing to extend said canal an additional thirty or forty miles so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said company intends to divert and appropriate water for said canal from the North Platte river, which is the only source of supply of the canal of this defendant, herein.

11. Defendant further alleges on information and belief that on or about the 17th day of July 1896 the Secretary of the State Board of Irrigation of the State of Nebraska, made certain inquiries and took certain evidence regarding the rights of The Farmers Canal Company to appropriate water from the North Platte river; that thereafter and on or about the 19th day of September 1896 said The Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the State of Nebraska its claim for an appropriation of water from the North Platte river to the extent of 275,000 minors' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres; that thereafter and on or about the 9th day of Jan. 1897, the Secretary of the State Board of Irrigation, on- W. R. Acres did render an opinion on said
124 claim and did make the same a matter of record in his office, in which opinion he the said secretary found and determined that the ditch or canal of said The Farmers Mutual Canal Company heads on the north bank of the North Platte river in the southwest quarter of section 3, Twp. 23 north, Range 58 west; and that said ditch is about 81 miles in length; that said ditch or canal covers and reclaims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dated from the 16th day of Sept. 1887. That said opinion further stated that the claim of the said The Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1st. That water appropriated shall be used for the purpose of irrigation.

2nd. That the time for completing the application of water to the beneficial use indicated shall extend to September 1st, 1904.

3rd. The amount of the appropriation shall not exceed 1142 6/7 cu. ft. of water per second of time, neither shall it exceed the capacity of said ditch or canal, nor the less amount of water that experience may hereinafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appro-

11 priation under any circumstances, shall be limited to 1/70 of one cu. ft. per second of time for each acre of land to which water has been actually and usefully applied on or before Sept. 1st, 1904.

12. Defendant further alleges that said W. R. Acres, Secretary of the State Board of Irrigation, in his said opinion made no finding as to the relative priority of the various appropriators of water from said stream. And this defendant further avers on information and belief that on the 7th day of Apr., 1897, the State Board of Irrigation caused a resolution — entered on its record affirming the
125 opinion of the State Board of Irrigation on the claim of the Farmers Mutual Canal Company above mentioned, and other opinions rendered by the said Secretary prior to said date.

13. And this defendant further avers that the finding of said Secretary that the priority of the appropriation of said The Farmers Canal Company dated from the 16th day of September, 1897, and that said Farmers Canal Company had an appropriation of 1142-6/7 cu. ft. was null and void and of no force and effect, and that the action of the State Board of Irrigation by resolution affirming said opinion of said Secretary of said State Board of Irrigation is likewise null and void and of no force and effect for the following reasons:

1st. Said W. R. Acres, Secretary of the State Board of Irrigation, was at the time of said adjudication a stock-holder in The Farmers Mutual Canal Company and financially interested therein, and was by that reason financially interested in the result of said decision, and was for that reason incapable from acting in a judicial capacity to determine the date of said priority, or the amount thereof, and his decision was for that reason null and void.

2nd. Said adjudication was null and void for the reason that no service of summons or notice was ever made upon this defendant, and that it entered no voluntary appearance bringing it before the tribunal of the State Board of Irrigation of the Secretary thereof, and the adjudication of said Secretary and of said State Board of Irrigation were null and void as to this defendant for that reason.

3rd. For the reason that no notice was ever issued by the said State Board of Irrigation or by the Secretary thereof; that its said Secretary was, at the time of the hearing held on the 9th day of March, 1897, adjudged and determined the appropriation of the Farmers Mutual Canal Company or of any other claimant for water from said North Platte river.

4. For the reason that the laws of the State of Nebraska provided no means of bringing this defendant before the said State
126 Board to enable said State Board to adjudge the conflicting claims of the Farmers Canal Company and this defendant.

14. Defendant further avers that at the time the Secretary of the State Board of Irrigations rendered the opinion above referred to and at the time the said State Board of Irrigation above referred to affirming said opinion, said The Farmers Canal Company had not constructed a canal 80 miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only 19 miles in length; that said company had not acquired an

appropriation of water for the irrigation of 80,000 acres of land, nor any part thereof except about 2,000 acres; that at said time said company had not acquired a right to appropriate 1142-6/7 cu. ft. of water per second of time from said river, nor any part thereof save and except about 28 cubic ft. of water per second of time, and that said opinion and said resolution so filed, setting out an adjudication that said The Farmers Canal Company had at that time an appropriation of 1142-6/7 cu. ft. of water per second of time are, as to this defendant, false and fraudulent in said particulars.

15. This defendant further alleges that it had no notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon; or any inquiry with reference thereto, or of the opinion of the Secretary of the State Board of Irrigation thereon, adjudicating and determining that said The Farmers Canal Company had an appropriation of 1142 6/7 cu. ft. of water per second of time, dating from the 16th day of September, 1887, or of the resolution entered on the record of the said Board affirming said opinion, and acquired no knowledge of the above transcript for many years after they had taken place. That no record of said adjudication was ever filed in the office of the County Clerk of Scotts Bluff County, Nebraska, nor was any certificate signed by the president of said State Board and attested by the Secretary or
127 otherwise, containing the name of the Post office address of said Company, or the priority of its appropriation, or the amount of water appropriated by it, or the amount of prior appropriation or any other information with reference to said claim of the Farmers Canal Company, either transmitted to the Clerk of Scotts Bluff County or to the Clerk of any other County in this State, nor was any such certificate with reference to the appropriation of the defendant herein, either transmitted to the said County Clerk of said County or the County Clerk of any other County. That this defendant was given no opportunity whatever of appearing before the State Board of Irrigation or its Secretary, for the purpose of showing the actual facts with reference to said claim of the Farmers Canal Company. And said opinion and resolution are therefore absolutely null and void.

16. Defendant further avers that neither The Farmers Canal Company, nor its grantees, nor either of them ever appropriated or applied to a beneficial use, prior to the year 1909, more than 28 cu. ft. of water per second of time, yet not-with-standing this fact, The Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired through and under the Farmers Canal Company a right to appropriate from the North Platte river 1142 6/7 cu. ft. of water per second of time, with a priority dating from the 16th day of September, 1887, and said companies have through their duly authorized officers and agents at various times asserted and declared that they have a right of appropriation to water from the North Platte river to the extent of 1142 6/7 cu. ft. of water per second of time continually flowing through the irrigation season of each and every year which is prior to the right of appropriation acquired by the right of this defendant and have threatened to con-

struct and maintain a dam across said river immediately below the headgate of its said canal and above the headgate of the canal of this defendant, for the purpose of intercepting and diverting
128 into said canal said quantity of water or so much thereof as may be flowing in said river.

17. This defendant further alleges that during the greater part of the irrigation season of 1910 said Tri-State Land Company and the said The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water in excess of 28 cu. ft. of water per second of time, and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of this defendant much below the quantity of water to which the defendant herein was entitled to divert from said river. That not-with-standing the fact that the State Board of Irrigation has no jurisdiction or authority to try to adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said Board and not-with-standing the fact that no adjudication was in fact made by said Board of the relative rights of this defendant and other parties to this action, and not-with-standing the fact that said State Board never acquired jurisdiction over this defendant to make such adjudication, yet because of the rendering of the above mentioned opinion by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned said State Board of Irrigation refused to limit or restrict said The Farmers Mutual Canal Company and The Tri-State Land Company or either of them in the diversion of water from said stream to 28 cu. ft. of water per second of time or of any quantity less than $1142 \frac{6}{7}$ cu. ft. but on the contrary said State Board of Irrigation caused the headgate of this defendant to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed the Farmers Mutual Canal Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of $1142 \frac{6}{7}$ cu. ft. of water per second of time; that during all of the time that the headgate of the canal of the defendant

herein was closed by the State Board of Irrigation as afore-
129 said, said The Farmers Canal Company and said Tri-State Land Company were diverting several hundred cu. feet of water per second of time from said river, which included $188 \frac{5}{7}$ cu. ft. of water per second of time which the defendant herein was entitled to have flow into and through its said canal for the irrigation of lands subject to irrigation therefrom.

18. Defendant further avers that to give the Farmers Mutual Canal Company or its grantors a priority over the defendant herein to the use of water to the extent of $1142 \frac{6}{7}$ cu. ft. of water per second of time would result in depriving this defendant and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution above referred to constitute a cloud on defendant's title to an appropriation of water from said stream and unless said cloud is cleared by a decree of this

Court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant the defendant herein or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of said stream by The Farmers Mutual Canal Company and The Tri-State Land Company and will permit all said companies to divert all of the water of said stream during times of scarcity to the entire exclusion of this defendant and the users of water from its canal.

19. This defendant further alleges that the North Platte river derives its supply of water from various streams heading in the mountains of Colorado and Wyoming and that the amount of water flowing therein varies greatly at different seasons of the year. That during the months of July and August of each year the amount of water flowing in said river at or near the headgate of this defendant and The Farmers Mutual Canal Company ranges from 100 to 2,000 cu. ft. of water per second of time, and the average flow during said time is about 875 cu. ft. per second of time. That
130 during September and October of each year the average flow of water in said stream is about 452 cu. ft. per second of time, and that during November of each year the flow of water in said river at said point averages 908 cu. ft. per second of time. That the average amount of water flowing in said river at and near the headgate of this defendant and the said The Farmers Mutual Canal Company during the months of July, August, September, October and November have been for several years last past and will be in the future much less than the amount of water which said The Farmers Mutual Canal Company and the Tri-State Land Company claims a right to divert and appropriate from said river prior to that of this defendant, and if said companies be permitted to divert 1142-6/7 cu. ft. of water per second of time prior to the defendant herein the said defendant and the users of water from its said canal will be wholly deprived of the use of water for irrigating purpose during the months of July, August, September and October and November of each and every year to the irreparable damage and injury to this defendant and the users of water from its said canal.

20. This defendant further alleges that the claim of said The Tri-State Land Company and The Farmers Mutual Canal Company, to a right to appropriate 1142-6/7 cu. ft. of water per second of time from the North Platte river during each and every irrigating season with a priority dating from the 16th day of September 1887, is unfounded in truth and in fact; that neither said The Farmers Mutual Canal Company, nor its grantors, nor either of them ever acquired a right to appropriate from said river any amount of water
except 28 cu. ft. per second of time, continually flowing during each irrigation season. That all rights of appropriation acquired by said the Farmers Mutual Canal Company and its grantors to appropriate water from the North Platte river except a right to 28 cu. ft.
per second of time, are junior and inferior to the rights of
131 appropriation acquired by this defendant. That if said The Tri-State Land Company and The Farmers Mutual Canal

Company ever did, by virtue of any proceedings taken by said companies or their grantors, or either of them, or otherwise, initiate a right of appropriation except 28 cu. ft. per second of time, which upon application to a beneficial use would ripen into an appropriation; said rights so initiated, if any, have become lost to said companies and their grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged rights, if any such was in any manner initiated or acquired by said companies or grantors. That notwithstanding the fact that the claim of the Tri-State Land Company and The Farmers Mutual Canal Company to an appropriation of 1142-6/7 cu. ft. of water per second of time during each and every irrigation season, with a priority dating from the 16th day of September 1887, is unfounded in truth and in fact, and that the rights acquired by said companies and their grantors, over and above 28 cu. ft. per second of time, are junior and inferior to the right of appropriation, of water from said river, acquired by this defendant, said companies will, unless restrained by an order or decree of this court, construct a dam across said river at the headgate of said canal, and will divert into said canal, during each irrigation season, all the water flowing in said river, to the extent of 1142-6/7 cu. ft. per second of time. That during the greater portion of each and every irrigation season there is less than 1142-6/7 cu. ft. per second of time flowing in said river, and during all of the time that there is less water than 1142-6/7 cu. ft. per second of time claimed by said The Farmers Mutual Canal Company and said The Tri-State Land Company, will take and divert from said river all the water flowing therein, and the water which this defendant is entitled to have flow into its said canal and will during the greater

132 portion of each irrigation season by so doing deprive this defendant from any water what-so-ever and from water to which it is entitled to divert from said river aforesaid, to the irreparable damage and injury to this defendant and the users of water from its said canal, and said Farmers Mutual Canal Company is about to so do by reason of the fact that its headgate is situated at farther up the river than the headgate of this defendant and can conduct the entire flow of said river before it reaches the canal of this defendant.

21. This defendant further alleges that any and all rights of its co-defendants herein, or the owners of irrigation canals diverting water from the said North Platte river, with headgates and diversion works situated on either bank of said river, and are each claiming the right to divert water from said river and to apply the same to irrigate land susceptible of irrigation from their various canals, and that each and all of said parties are necessary parties of the proper adjudication of the rights of this defendant, and of the rights of The Tri-State Land Company to the water from said river.

22. That the State Board of Irrigation and the Secretary thereof refuses to give to this defendant the water for purpose of irrigation to which it is entitled, as aforesaid. And notwithstanding the fact that the order, of the Secretary of the State Board of Irrigation,

awarding an appropriation to The Tri-State Land Compad and The Farmers Mutual Canal Company and their grantors was made ex party and without any service of process upon this defendant or any notice to this defendant of any kind what-so-ever; said State Board of Irrigation and said Secretary thereof allege and affirm that its said finding was an adjudication binding upon this defendant and upon the users of water from its said canal, and distribute said water in accordance with said alleged adjudication and finding, greatly to the damage of this defendant and the water users of its said canal.

133 Wherefore this defendant prays that a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired a right to appropriate from said river, and the relative priorities of said rights of appropriation.

2. That it be adjudged and decreed that the defendant herein has acquired the right to appropriate water from the North Platte river to the extent of 188-5/7 cu. ft. per second of time, continually flowing during each and every irrigation season with a priority dating from the 20th day of January 1892, and said right is prior in time and prior in rights of appropriation of the Farmers Mutual Canal Company and The Tri-State Land Company, save and except the right to 28 cu. ft. per second of time.

3. And that the title to said right of appropriation of said defendant be quieted and confirmed in the defendant as against each and all of the parties hereto. And that the cloud cast on defendant's title, by reason of the alleged adjudication by the Secretary of the State Board of Irrigation, and the resolution of said Board of Irrigation confirming said opinion, be removed. And that the parties hereto be restrained from diverting water from said river, except in accordance with the decree rendered herein. And that this defendant be granted any other and further relief as m-y be just and equitable in the premises, and that this defendant recover its cost herein expended.

THE BROWNS CREEK IRRIGATION COMPANY,

By — — —, *Its Attorneys.*

STATE OF NEBRASKA,
Lincoln County, ss:

John J. Halligan being first duly sworn deposes and says that he is one of the attorneys for the defendant, The Browns Creek Irrigation Company, that said defendant is a corporation, that
134 he has read the foregoing answer and cross-petition and that the allegations therein contained are true as he verily believes.

Subscribed in my presence and sworn to before me this — day
of — 1910.

Notary Public.

And afterwards on the 28th day of November 1910 there was filed in the office of the Clerk of the District Court of Scotts Bluff County of Scotts Bluff County, Nebraska, an answer and amended and supplemental cross-petition of the Minatare Mutual Canal and Irrigation Company in words and figures following, to-wit:

135 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation District, The Central Irrigation District, The Castle Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, the Belmount Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-partnership under the firm name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemental Cross-petition.

Comes now the above named defendant, The Minatare Mutual Canal and Irrigating Company, and for answer to the amended and supplemental petition of the plaintiff herein alleges:

First. This defendant admits the allegations contained in paragraphs one to nine inclusive, eleven to twenty-one inclusive, twenty-three to twenty-six and twenty-eight of said amended and supplemental petition, and all other allegations in said amended and supplemental petition contained that are hereafter affirmatively set out in the cross petition of this defendant; this defendant denies each and every other allegation in said amended and supplemental petition contained, except such allegations as are herein after admitted or qualified.

136 *Amended and Supplemental Cross-petition.*

For its amended and supplemental cross-petition against the plaintiff and the other defendants to this action, this defendant, for and on behalf of itself and the users of water from its canal hereinafter described, alleges:

First. That on or about the 14th day of January 1888, The Minatare Canal and Irrigation Company, a corporation organized under and by virtue of the laws of the State of Nebraska posted a notice at a point on the north bank of the North Platte River, in Section 32, Township 22 north, Range 54 west, of the 6th P. M. in Scotts Bluff

County, Nebraska, of its intention to divert a and appropriate a sufficient quantity of water from said river at said point, to fill a canal 30 feet wide on the bottom and $2\frac{1}{2}$ feet deep, and in addition thereto, another canal 20 feet wide on the bottom and $2\frac{1}{2}$ feet deep, said water to be conducted in an easterly direction down the valley of the North Platte River, for irrigation and other useful and beneficial purposes, which said notice was on the 14th day of January 1888, filed in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in Miscellaneous Records, No. 1 at page 7 of the records of said office.

Second. That immediately after the posting of said notice above mentioned, said The Minatare Canal and Irrigating Company commenced the construction of a canal from said point of diversion and prosecuted the same diligently and uninterruptedly until about the 1st day of September 1899, at which time said canal was completed. That said canal extends in an easterly direction from the point of diversion through said Section 32, through Section 33, and to a line between the southwest and southeast quarters of Section 34, at which point said canal divides into two branches; the north branch thereof extends northeast from said point of division to the northeast corner of Section 34, then southeast through Section- 35
137 and 36, Township 22 north, Range 54 west and through Section 31, Township 22 north Range 53 west, and through Sections 6, 5, 4, 3, 10, 11, 2, and 1 Township 21 north, Range 53 west. That the south branch of said canal extends in an easterly direction from said point of division through Sections 34 and 35 Township 22 north, Range 54 west and through Sections 2 and 1 Township 21 north, Range 54 west and through Section- 6, 7, 18, 17, 16, 22, 23, and 24 of Township 21 north Range 56 west of the 6th P. M. That the headgate of said canal was, when completed and still is, 60 feet wide on the bottom, and said ditch immediately below the headgate is 60 feet wide on the bottom. That from a point $\frac{1}{4}$ of a mile below the headgate of said ditch to the point where it divides into two branches, it is about 30 feet wide on the bottom, That the south branch of said ditch is about 20 feet wide on the bottom from the point where it divides into two branches to the terminus thereof. That the north branch of said ditch is about 10 feet wide on the bottom from the point of division for a distance of two or three miles below said point, from whence it gradually narrows to about $7\frac{1}{2}$ feet on the bottom at the terminus thereof. That the grade of said canal is about 1-1/8 feet per mile.

Third. That on or about the 16th day of May 1896, the Minatare Canal and Irrigation Company sold, assigned, transferred and set over said canal and the right of appropriation acquired by it and all other rights, franchises and privileges belonging to it, to The Minatare Mutual Canal and Irrigating Company, a corporation organized under the laws of the state of Nebraska, which has ever since been and which now is the owner of the same.

Fourth. That on or about the 21st day of September 1888, water was conducted through said canal from the North Platte River
138 to the lands subject to irrigation therefrom, said lands being the place of intended use of said water. That about 500 acres of land were irrigated through and by means of

said canal during said year and the amount of land irrigated therefrom was increased each year thereafter, until all of the land subject to irrigation from said canal was reclaimed. That all of said land had been reclaimed prior to the 1st day of September 1899, and all of said lands had been irrigated from said canal during each and every year thereafter. The lands reclaimed through and by means of said canal are described as follows:

The S. E. $\frac{1}{4}$ 40 acres in the S. W. $\frac{1}{4}$, 60 acres in the N. E. $\frac{1}{4}$ of Section 34, Township 22 north, Range 54 west, the S. E. $\frac{1}{4}$ 40 acres in the S. W. $\frac{1}{4}$ 60 acres in the N. E. $\frac{1}{4}$ of Section 34, Township 22 north Range 54 west of the 6th P. M., the S. $\frac{1}{2}$ 80 acres in the N. E. $\frac{1}{4}$ of Section 34, Township 22 north, Range 54 west of the 6th P. M., The S. W. $\frac{1}{4}$ 80 acres in the S. E. $\frac{1}{4}$, 20 acres in the N. W. $\frac{1}{4}$ of Section 36, Township 22 north, Range 54 west of the 6th P. M. The N. E. $\frac{1}{4}$, 120 acres in the N. W. $\frac{1}{4}$, 60 acres in the S. E. $\frac{1}{4}$ of Section 3, Township 21 north, Range 54 west of the 6th P. M. all of Section 2, Township 21 north, Range 54 west of the 6th P. M. the N. E. $\frac{1}{4}$, 40 acres in the N. W. $\frac{1}{4}$ 40 acres in the S. E. $\frac{1}{4}$ of Section 11, Township 21 north, Range 54 west of the 6th P. M. all of Section 1, Township 21 north, Range 54 west of the 6th P. M. the N. W. $\frac{1}{4}$ the N. E. $\frac{1}{4}$ the S. E. $\frac{1}{4}$ of Section 12 north, Range 54 west of the 6th P. M. the N. E. $\frac{1}{4}$ of Section 3, Township 21 north, Range 54 west of the 6th P. M., the N. E. $\frac{1}{4}$ of Section 3 Township 21 north, Range 54 west of the 6th P. M., S. $\frac{1}{2}$ 120 acres in the N. W. $\frac{1}{4}$ of Section 6, Township 21 north, Range 53 west of the 6th P. M., all of Section 7, Township 21 north, Range 53 west of the 6th P. M. the N. $\frac{1}{2}$ 100 acres in the S. $\frac{1}{2}$, Section 18, Township 21 north, Range 52 west of the 6th P. M. S. $\frac{1}{2}$ of Section 5, Township 21 north, Range 53 west of the 6th P. M. All of Section 8, Township 21 north Range 53 west of the 6th P. M.

M. the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$, 120 acres in the S. W. $\frac{1}{4}$ of 139 Section 17, Township 21, north Range 53 west of the 6th P. M. 60 acres in the N. E. $\frac{1}{4}$ of Section 20, Township 21 north, Range 53 west of the 6th P. M. the S. E. $\frac{1}{4}$ 120 acres in the S. W. $\frac{1}{4}$, 100 acres in the N. E. $\frac{1}{4}$ of Section 4, Township 21 north, Range 53 west of the 6th P. M. all of Section 9, Township 21 north, Range 53 west of the 6th P. M. all of Section 16, Township 21 north, Range 53 west of the 6th P. M. the N. E. $\frac{1}{4}$ 140 acres in the N. W. $\frac{1}{4}$ 100 acres in the S. E. $\frac{1}{4}$ of Section 21, Township 21 north, Range 53 west of the 6th P. M. the N. W. $\frac{1}{4}$ of Section 22, Township 21 north, Range 53 west of the 6th P. M. the W. $\frac{1}{2}$ of Section 15, Township 21 north, Range 53 west of the 6th P. M. 60 acres in the N. W. $\frac{1}{4}$ of Section 3, Township 21 north, Range 53 West of the 6th P. M.

Fifth. That by virtue of the performance of the acts above enumerated, by the Minatare Mutual Canal and Irrigating Company and its grantor, said Minatare Mutual Canal and Irrigating Company has acquired and now is the owner of the right to appropriate from the North Platte River a sufficient quantity of water for the irrigation of the above described lands, to-wit, 249-3/7 cubic feet of water per

second of time, continually flowing during each and every irrigation season with a priority dating from the 14th day of January 1888.

Sixth. This cross-petitioner further avers that on or about the 31st day of May 1895 the County Clerk of Scotts Bluff County, Nebraska, made a transcript of the above mentioned notice and transmitted the same to the office of the Secretary of the State Board of Irrigation of the State of Nebraska, and said transcript of said notice was filed by the said Secretary of the State Board of Irrigation in his office on the 31st day of May 1905; that thereafter the Secretary of the State Board of Irrigation forwarded to the Minatare Mutual Canal and Irrigating Company a blank "Callim for the waters of the State of Nebraska," to be filled out, giving the information

therein required regarding the claim of said Company to the use of water from the North Platte River; that said blank was filled out by one Samuel D. Cox, one of the directors of said Company and was returned by him to the office of the Secretary of the State Board of Irrigation and filed in said office on the 17th day of July 1896; that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation made certain inquiries and took certain evidence regarding the claim of said The Minatare Mutual Canal and Irrigating Company; that on the 7th day of January 1897, the said Secretary of the State Board of Irrigation rendered an opinion on said claim and made the same a matter of record in his office, in which opinion said Secretary found and determined that said The Minatare Mutual Canal and Irrigating Company had constructed a ditch or canal as stated in this cross-petition; that said ditch or canal covers and reclaims the lands herein described and that the priority of the appropriation of said The Minatare Mutual Canal and Irrigating Company dated from the 14th day of January 1888.

Seventh. This cross-petitioner further avers that said opinion of the Secretary of the State Board of Irrigation contained no finding whatever regarding any other appropriation or claim for the use of water from said stream, nor did said opinion determine or find that any other person, company, corporation or party was entitled to appropriate any water whatever from said stream, either prior or subsequent to said The Minatare Mutual Canal and Irrigating Company, nor did said opinion contain any finding whatever as to the relative priorities of the various appropriators of water from said stream; that said The Minatare Mutual Canal and Irrigating Company had no notice that any person, company or corporation claimed the right to appropriate water from said stream prior to the said Minatare Mutual Canal and Irrigating Company.

Eighth. This cross-petitioner further avers on information and belief that several other claimants for the use of water from the North Platte River had, prior to the 7th day of April 1897, filed with the Secretary of the State Board of Irrigation of the State of Nebraska their respective claims for the use of water from the North Platte River; that the Secretary of the State Board of Irrigation after making such exparte inquiry and taking such evidence exparte as he deemed necessary and advisable on each

of said claims, rendered a separate opinion on each of said claims; that no claimant for water from said river had any notice whatever of the claims for water filed by others, nor had any claimant for water from said river, any notice of the opinions of the Secretary of the State Board of Irrigation on the other claims for water from said river; that on the 7th day of April 1897, the State Board of Irrigation, without any notice to the claimants of appropriations of water from said river or any of them, and without the knowledge of this cross-petitioner or its grantor, caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of said Board, prior to that date, including the opinion rendered on the claim of this cross-petitioner.

Ninth. This cross-petitioner further avers that neither it nor its grantor had any notice, knowledge or information concerning the various opinions rendered by said Secretary of the State Board of Irrigation, prior to the 7th day of April 1897, on the claims of others for rights to the use of water from the North Platte River, or any of them, or of the passage of the above mentioned resolution affirming said opinions, and neither this cross petitioner nor its grantor acquired any knowledge of said action for several years thereafter, nor until shortly prior to the commencement of this action and neither this cross-petitioner nor its grantor had any notice or information that the State Board of Irrigation ever intended to do anything more than make a record of the claim of this cross-petitioner in its office.

142 Tenth. That during each and every month of each and every irrigation season there has been a sufficient amount of water flowing down the channel of said river to the headgate of the canal of this cross-petitioner to supply a sufficient quantity of water to be diverted into said canal to irrigate all of the lands above mentioned; that prior to the time said lands were irrigated they were on account of insufficient moisture and rainfall, desert in character and incapable of producing crops, but since irrigating the same they have become very productive and valuable, and have been brought to a high state of cultivation. That since the application of water to said lands through and by means of said canal they have been used in raising various kinds of vegetables, grains, hay and other crops adapted to the climatic conditions of the country. That some of said lands have been planted to alfalfa and some to shrubbery and trees which are all in good flourishing condition, owing to the fact that they have been irrigated, and it is absolutely necessary to continue to irrigate the same during the various months of each irrigation season in order to preserve the said crops, trees and shrubbery from ruin and destruction; that without irrigation said lands would become practically valueless and the prosperous homes now located thereon would be destroyed and ruined.

Eleventh. Cross-petitioner further avers that on or about the 31st day of August, 1887, a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the State of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws

of said State. That in the spring of 1888, said Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte River at a point on said river in Scotts Bluff County, Nebraska, where the west line of Section 10, Township 25 north, Range 58 west, intersects the north bank thereof, for irrigation purposes. That said point of diversion

143 of the Farmers Canal Company is about 30 miles up the river from the headgate of the canal of this cross-petitioner.

That said The Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said company ceased work thereon. That at said time there were not more than 1500 acres of land susceptible to irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 1000 or 1200 acres of land. That said company did not again resume work on said canal until the spring of 1892 at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the summer of 1893 when it again ceased work on said canal. That when said company ceased work on said canal in 1893 it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about 2500 or 3000 acres of land. That as completed in 1893 there were not more than 2000 acres of land susceptible of irrigation from said canal, and said company and *its* grantees never irrigated more than 2000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2000 acres of land. That on or about the 23rd day of December, 1901, said canal of the Farmers Canal Company together with all its property, rights and franchises, was sold under a decree of foreclosure to one Roberts Walker, who on or about the 20th day of October, 1904, sold and conveyed the same to the Tri-State Land Company, one of the defendants above named, which is a corporation organized and existing under and by virtue of the laws of the state of New Jersey.

Twelfth. That no further work was done on said canal from the time that The Farmers Canal Company ceased work thereon

144 in the year 1893 until the defendant, The Tri-State Land Company commenced to enlarge and extend the same in September, 1906. That said defendant The Tri-State Land Company prosecuted work thereon from September, 1906, until the Fall of 1907, and did enlarge said canal at the headgate and for some distance below the headgate to a width of 90 feet at the bottom and a depth of 11 feet, and did extend the same in an easterly direction for a distance of about 40 miles from the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land.

That prior to the commencement of this action said Tri-State Land Company entered into a contract with The Farmers Mutual Canal Company, a corporation organized and existing under the laws of the State of Nebraska, whereby said Tri-State Land Company

agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal, water rights, appropriations and franchises of said The Tri-State Land Company, and plaintiff is informed and believes and on such information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal together with all water rights, appropriations and franchises acquired by it to said The Mutual Canal Company receiving in payment therefor all the capital stock of The Farmers Mutual Canal Company a majority of which said capital stock said Tri-State Land Company still owns and controls. That Tri-State Land Company and said Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 or 40 miles so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said Companies intend to divert and appropriate water through said canal from the North Platte River, which is the only source of supply of the canal of the said cross-petitioner herein.

Thirteenth. This cross-petitioner further avers on information and belief that on or about the 17th day of July 1896, the
 145 Secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of The Farmers Canal Company to appropriate water from the North Platte River; that thereafter and on or about the 19th day of September 1895, said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska its claim for an appropriation of water from the North Platte River to the extent of 275,000 minors' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres; that thereafter and on or about the 9th day of January 1896, the Secretary of the State Board of Irrigation did render an opinion on said claim and made the same a matter of record in his office, in which opinion he, the said Secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte River in the southwest quarter of the southeast quarter of section three, township twenty-three north, range fifty-eight west; that said ditch is about eighty-one miles in length; that said ditch or canal covers and re-claims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dated from the 16th day of September 1887. Said opinion further stated that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd. The amount of the appropriation shall not exceed eleven hundred and forty-two and six sevenths ($1142\frac{6}{7}$) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may
 146 hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appro-

priation under any circumstances, shall be limited to one seventieth ($1/70$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

But said opinion contained no finding whatever as to relative priorities of the various appropriations of water from said stream.

Fourteenth. This cross-petitioner further avers on information and belief that on the 7th day of April 1897, the State Board of Irrigation caused a resolution to be entered on its records affirming the opinion of the Secretary of the State Board of Irrigation on the claim of the Farmers Canal Company above mentioned, and other opinions rendered by said Secretary prior to said date.

Fifteenth. This cross-petitioner further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the said State Board of Irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty-miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land, nor any part thereof, except about two thousand acres; that at said time said company had not acquired a right to appropriate 1142-6/7 cubic feet of water per second of time from said river nor any part thereof, except about twenty-eight cubic feet of water per second of time; and said opinion and said resolution are erroneous and false in said particulars.

Sixteenth. This cross-petitioner further avers that neither The Minatare Mutual Canal and Irrigating Company nor its
147 grantor, had any notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon, or inquiry with reference thereto, or of the opinion of the Secretary of the State Board of Irrigation thereon, or of the resolution entered upon the records of said Board affirming said opinion; nor did this cross-petitioner or its grantor acquire any knowledge whatever of the above mentioned transaction of said Board and its Secretary for several years after they had taken place; that no copy of said opinion and resolution, or either of them, was ever at any time delivered to this cross-petitioner or to its grantor, or filed in the office of the County Clerk of Scotts Bluff County, Nebraska; nor was any certificate signed by the president of said Board and attested by the Secretary, or otherwise, containing the name of the post-office address of said Company or the priority of its appropriation, or the amount of water appropriated by it, or the amount of prior appropriation or any other information with reference to said claim of said The Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska, or to the County Clerk of any other county in said state, nor was any such certificate with reference to the appropriation of this cross-petitioner ever transmitted to the County Clerk of said County or the County Clerk of any other County. That neither this cross-petitioner nor its grantor was given

any opportunity whatever of appearing before the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference to said claim of The Farmers Canal Company, and said opinion and resolution are therefore absolutely null and void.

Seventeenth. This cross-petitioner further avers that neither The Farmers Canal Company nor its grantees, nor either of them, ever appropriated or applied to a beneficial use, prior to the year 1909,

148 more than twenty-eight cubic feet of water per second of time, yet notwithstanding this fact, The Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired, through and under the Farmers Canal Company, a right to appropriate from the North Platte River 1142-6/7 cubic feet of water per second of time with a priority dating from the 16th day of September 1887 and said Companies have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte River to the extent of 1142-6/7 cubic feet per second of time, continually flowing during the irrigation season of each and every year which is prior to the right of appropriation acquired by this cross-petitioner and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the canal of this cross-petitioner for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river.

Eighteenth. This cross-petitioner further avers that during the greater portion of the irrigation season of 1910 said The Tri-State Land Company and The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of twenty-eight cubic feet of water per second and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of this cross-petitioner much below the quantity of water to which this cross-petitioner was entitled to divert from said river; that notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said Board and notwithstanding the fact that no adjudication was in fact made by said Board of the relative rights of this cross-petitioner and the other parties to this action, yet because of the rendering of the
149 of the opinion above mentioned by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation refused to limit or restrict said Farmers Mutual Canal Company and The Tri-State Land Company, or either of them, in the diversion of water from said stream to twenty-eight cubic feet of water per second of time, or to any quantity less than 1142-6/7 cubic feet per second of time, but on the contrary said State Board of Irrigation caused the headgate of the canal of this cross-petitioner to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed The Farmers Mutual Canal Company and

The Tri-State Land Company to divert as much water from said river as they desired to the extent of 1142-6/7 cubic feet of water per second of time; that during all of the time that the headgate of the canal of this cross-petitioner was closed by the State Board of Irrigation as aforesaid, said Farmers Mutual Canal Company and Tri-State Land Company were diverting several hundred cubic feet of water per second of time *per second of time* from said river, which included 247-3/7 cubic feet of water per second of time which this cross petitioner was entitled to have flow into and through its said canal for the irrigation of land subject to irrigation therefrom.

Nineteenth. This cross-petitioner further avers that to give The Farmers Mutual Canal Company or its grantors a priority over the cross-petitioner to the use of water to the extent of 1142-6/7 cubic feet of water per second of time would be to deprive this cross-petitioner and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution above referred to constitute a cloud on this cross-petitioner's title to an appropriation of water from said stream and unless said cloud is cleared by a decree of this Court the State Board of Irriga-
150 tion will continue in the future as it has in the past to refuse to grant this cross-petitioner or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of said stream by The Farmers Mutual Canal Company and The Tri-State Land Company, and will permit said Company to divert all of the water of said stream during times of scarcity to the entire exclusion of this cross-petitioner and the users of water from its canal.

Twentieth. That the average flow of water in said river at or near the headgate of the canal of this cross-petitioner and that of the defendants The Farmers Mutual Canal Company and The Tri-State Land Company during part of July and during all of the months of August, September, October and November has been for several years last past, and will be in the future, much less than the amount of water which said defendants The Farmers Mutual Canal Company and The Tri-State Land Company claim a right to divert and appropriate prior to the right of this cross-petitioner and if said companies be permitted to divert 1142-6/7 cubic feet of water per second of time prior to the cross petitioner herein the said cross-petitioner and the users of the water from its said canal will be deprived of the use of water for irrigation purposes during the latter part of the month of July and during the months of August, September, October and November of each and every year, to the irreparable damage and injury of said cross-petitioner and the users of water from its canal.

Twenty-first. This cross-petitioner further avers that the claim of The Farmers Mutual Canal Company and The Tri-State Land Company to the right of appropriate 1142-6/7 cubic feet of water per second of time from the North Platte River during each and every irrigation season is unfounded in truth and in fact; that neither The Farmers Mutual Canal Company, The Tri-State Land Com-

pany, nor its grantors, nor either of them, ever acquired a right to appropriate from said river any amount of water whatsoever except a sufficient amount to irrigate about 2000 acres of land, or 28 cubic feet of water per second of time, continuously flowing during each irrigation season. That all rights of appropriation acquired by said companies and their grantors to appropriate water from the North Platte River, if any rights were acquired by said Companies or either of them, are subsequent, junior and inferior to the right of appropriation of water from said river acquired by this cross-petitioner. That if said The Tri-State Land Company or The Farmers Mutual Canal Company ever did, by virtue of any proceedings taken by said company or its grantors or either of them, or otherwise initiate a right of appropriation which, upon application to a beneficial use, would ripen into a right to appropriate water from said river, said rights so initiated, if any, have become lost to said The Farmers Mutual Canal Company and its grantors by non-users and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged right, if any right was in any manner ever initiated or acquired by said companies or its grantors. That notwithstanding the fact that the claim of said The Tri-State Land Company and The Farmers Mutual Canal Company to an appropriation of 1142-6/7 cubic feet of water per second of time from said river during each and every irrigation season, with a priority dating from the 16th day of September 1887 is unfounded in truth and in fact, and that the rights acquired by said Companies and their grantors are subsequent, junior and inferior to the rights of appropriation of water from said river acquired by this cross-petitioner and the users of water from its said canal, said The Tri-State Land Company and The Farmers Mutual Canal Company will, unless restrained by an order or decree of this court, construct a dam across said river at the headgate of its canal, and will divert into said canal during each irrigation season, all of the water flowing in said river to the extent of 1142-6/7 cubic feet of water per second of time. That during the greater portion of each and every irrigation season there is less than 1142-6/7 cubic feet of water per second of time flowing in said river and during all of the time that there is less water in said river than 1142 6/7 cubic feet per second of time claimed, by said Farmers Mutual Canal Company, and The Tri-State Land Company and in addition thereto 249-5/7 cubic feet of water per second of time claimed by this cross-petitioner said defendants The Farmers Mutual Canal Company and The Tri-State Land Company will take and divert from said river water which the cross-petitioner herein is entitled to have flow into its canal and will during the greater portion of each and every irrigation season take and divert from said river all the water flowing therein and thus prevent this cross-petitioner on said river. That each of said parties claim- a right of to the irreparable damage and injury of this cross-petitioner and the users of water from its said canal.

Twenty-second. That the headgate of the canal of the plaintiff and those of the defendants The Farmers Mutual Canal Company,

The Tri-State Land Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company and The Central Irrigation District are all located above the headgate of the canal of this cross-petitioner on said river. That each of said parties claims a right of appropriation of water from said river but whatever right either of said parties may have to appropriate water from said river, the same is subsequent, junior and inferior to the right of appropriation acquired by this cross-petitioner and the rights of all the other parties to said action are junior and inferior to the right of appropriation acquired by this cross-petitioner.

Wherefore the cross-petitioner prays:

1. That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired a right to appropriate from said river
153 and the relative priorities of said rights of appropriation.

2. That it be adjudged and decreed that this cross-petitioner has acquired a right of appropriation of water from the North Platte River to the extent of 249-3/7 cubic feet of water per second of time continually flowing during each and every irrigation season with a priority dating from the 14th day of January 1888, and that said right is prior in time and prior in right to the right of appropriation of the other parties to this action and each of them, and that the title to said right of appropriation of this cross-petitioner be quieted and confirmed in this cross-petitioner as against the other parties to this action and each of them. And that the cloud cast on cross-petitioner's title *be* reason of the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board confirming said opinion be removed.

3. That the plaintiff and the defendants, The Farmers Mutual Canal Company, The Tri-State Land Company, The Mitchell Irrigation District, The Gering Irrigation District, The Ramshorn Ditch Company, The Winters Creek Irrigation Company, The Central Irrigation District and each of them, be enjoined and restrained from decreasing or diminishing the flow of water in said river at the headgate of the canal of this cross-petitioner below the amount of water which said cross-petitioner has acquired a right to appropriate, to-wit 249-3/7 cubic feet of water per second of time continually flowing during each and every irrigation season, and the amount of water if any, which it may be adjudged and decreed that this cross-petitioner shall permit to flow down the channel of said river past its headgate.

4. That this cross-petitioner be granted such other and further relief as may be just and equitable.

154 5. That this cross-petitioner have and recover judgment for the costs of this action.

THE MINATARE MUTUAL CANAL AND
IRRIGATING COMPANY,
By MORROW & MORROW, *Its Attorneys.*

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

W. S. Pickering being first duly sworn, deposes and says that he is the President of the Minatare Mutual Canal and Irrigating Company, the cross-petitioner above named; that he has read the foregoing answer and amended cross-petitioner and knows the contents thereof; that the facts therein stated are true as he verily believes.

W. S. PICKERING.

Subscribed in my presence and sworn to before me this 22nd day of November A. D. 1910.

My commission expires Aug. 25th, 1914.

[SEAL.]

E. O. HARSHMAN,
Notary Public.

And afterwards, on the 26th day of November 1910 there was filed in the office of said Clerk a separate answer of the Tri-State Land Company to the amended and supplemental petition of Plaintiff, in which The Farmers Mutual Canal Company joins.

155 In the District Court of Scotts Bluff County, Nebraska.

ENTERPRISE IRRIGATION DISTRICT, Plaintiff,
vs.

TRI-STATE LAND COMPANY et al., Defendants.

Separate Answer of the Tri-State Land Company to the Amended and Supplemental Petition of Plaintiff in Which Farmers Mutual Canal Company Joins.

The Tri-State Land Company and The Farmers Mutual Canal Company for answer to the amended and supplemental petition of plaintiff:—

I.

Admits that The Enterprise Ditch Company was at all times mentioned in plaintiff's petition, a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

II.

Admits that prior to the 28th day of March 1889, the Enterprise Ditch Company made a survey of a canal from a point on the north bank of the North Platte River about 40 rods south and 500 feet west of the northeast corner of the northeast quarter of section 28, township 23 north, range 57 west of the 6th P. M. in Scotts Bluff County, Nebraska, and on said day posted a notice at said point on the bank of said river of its intention to divert water from said river at said point, sufficient to fill a ditch 30 feet wide at the bottom and 4 feet deep, to be used for irrigating milling and manufacturing and

other purposes, and that on March 30, 1889 said notice was filed for record in the office of the County Clerk, and duly recorded therein.

III.

Admits that upon the posting of said notice said Enterprise Ditch Company commenced the construction of said canal.

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IV.

Admits that on August 14, 1893 it changed the point of diversion of said water from said river, from the place where previously located, to a point in section 27, township 23 north range 57 west of the 6th P. M., claiming an enlarged capacity for said ditch and an additional amount of water and that said notice was posted at the new point of diversion on said day, and on the 18th day of August 1893 was filed for record in the office of the County Clerk and duly recorded therein.

V.

Admits that after posting said last mentioned notice it began the construction of a new headgate at the new point of diversion and the enlargement of the canal previously constructed and prosecuted said work to completion; and that upon completion and on or about the 20th of April 1895 it posted at the new headgate notice of its intention to change the point of diversion, which notice was on the same day filed for record with the County Clerk and duly recorded.

VI.

Admits the completion of said canal in the year 1895; admits the carrying capacity of said completed ditch as shown in paragraph VI. of plaintiff's amended and supplemental petition.

VII.

Admits that water was conducted through the canal when completed, in 1895, for the irrigation of some of the lands described in paragraph VII. of said amended and supplemental petition.

VIII.

Admits that on the 27th day of June 1898 the plaintiff was organized under the act of the Legislature approved March 26, 1895 and embraced and including the lands described in paragraph VII. of said amended and supplemental petition.

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IX.

Admits that on the 17th day of March 1900 the Enterprise Ditch Company sold and conveyed to plaintiff its canal, together with all water rights, franchises, privileges, immunities and properties belonging to said Enterprise Ditch Company.

X.

Admits that on or about the 28th day of May 1895 the County Clerk of Scotts Bluff County, Nebraska, made a transcript of the above mentioned notice and transferred the same to the office of the Secretary of the State Board of Irrigation of the State of Nebraska; and alleges that said transcript of said County Clerk contained all of the notices which had been posted by either plaintiff or its grantor, and also each of the notices posted and filed by said several defendants and each of them, and their grantors, claiming a right to divert any portion of the waters of the North Platte River, and which were then on file in the office of the County Clerk of Scotts Bluff County, Nebraska.

Admits that said transcript was filed in the office of said Secretary of the State Board of Irrigation on the 31st day of May 1895, and that thereafter the Secretary of the State Board of Irrigation forwarded to the Enterprise Ditch Company a blank "Claim for the waters of the State of Nebraska" which was duly received and filled out by the Secretary of said Enterprise Ditch Company and duly returned by him to the Secretary of the State Board of Irrigation of Nebraska and filed in his office on the 15th day of October 1895.

And this defendant further alleges that each of the said parties hereto, plaintiff and defendant, or their grantors, save only the defendants Gering Irrigation District and the Steamboat Ditch Company, likewise filled out similar blanks for "Claims for the waters of the State of Nebraska," and each of them claimed said waters by virtue of appropriation and posting of notices, prior to the enactment of the Irrigation Act of 1895; and that said blanks were each filled out and filed in the office of the Secretary of the State Board of Irrigation, pursuant to his request.

And this defendant further alleges that on June 5, 1896, after all of said claims had been filed, as aforesaid, in the office of the Secretary of the State Board of Irrigation, a notice was duly issued on June 5, 1896, by the said Secretary of said Board, that said claims would be heard and the rights of the claimants determined on the 17th day of July, 1896.

Admits that on or about the 17th day of July 1896 the Secretary of the State Board of Irrigation made inquiry and took evidence regarding the claim of said the Enterprise Ditch Company and on the 7th day of January 1897 rendered an opinion on said claim and made the same a matter of record in his office, wherein and whereby said Secretary found and determined that the Enterprise Ditch Company was entitled to 173-5/7 cubic feet of water per second of time, with a priority dating from the 28th day of March 1889.

And this defendant further alleges that on the same day and at the same time and place, evidence was introduced and a hearing was had on the claims of the Farmers Canal Company, The Minatare Canal Company, The Castle Rock Irrigation Canal & Water Power Company, The Central Irrigation District, The Nine Mile Irrigation District, The Ramshorn Ditch Company, The Winters Creek Irrigation Company and the claim of Charles E. Logan; and the claims of

The Alliance Irrigation Canal & Water Power Company, The Chimney Rock Irrigation Canal & Water Power Company, The Browns Creek Irrigation Company and The Belmont Irrigation Canal & Water Power Company were each adjudicated under the notice of June 5, 1896, at a meeting held at the town of Bayard in Cheyenne County; and that the Secretary of the State Board of Irrigation upon each of said claims, and under the evidence so received in regard to the several claims, of the said defendants named, and each of them, rendered an opinion on said several and respective claims at the same time, in which the priority of each claim was determined as follows: The Farmers Canal Company 1142.86 cubic feet, with a priority dating from September 16, 1887; The Minatare Mutual Canal Company 249.43 cubic feet with a priority dating from January 14, 1888; The Winters Creek Irrigation Company 124.29 cubic feet, with a priority dating from October 18, 1888; The Enterprise Ditch Company 173.71 cubic feet with a priority dating from March 28, 1889; Castle Rock Irrigation Canal & Water Power Co., 82.57 cubic feet with a priority dating from April 18, 1889; Charles E. Logan 5.71 cubic feet, with a priority dating from October 17, 1889; Belmont Irrigation Canal & Water Power Company 270 cubic feet with a priority dating from December 19, 1889; Central Irrigation Canal & Water Power Company 36 cubic feet, with a priority dating from June 23, 1890; Chimney Rock Irrigation Canal & Water Power Company 60 cubic feet, with a priority dating from December 3, 1890; Browns Creek Irrigation Canal Company 188.71 cubic feet with a priority dating from January 20, 1892; Alliance Irrigation Canal & Water Power Company 100 cubic feet, with a priority dating from December 26, 1892; The Ramshorn Ditch Company 45.71 cubic feet with a priority dating from March 20, 1893; Nine Mile Canal Company 200 cubic feet, with a priority dating from December 6, 1893.

That the defendants The Steamboat Ditch Company and The Gering Irrigation District were neither of them organized or existing until after the passage of the Irrigation law of 1895; and that the said defendants and each of them made application to the State Board of Irrigation for unappropriated waters of the North Platte River and such proceedings were had that the State Board of Irrigation granted to the defendant The Steamboat Ditch Company 15 cubic feet of water per second of time with a priority dating from October 22, 1895; and to The Gering Irrigation District 500 cubic feet of water per second of time, with a priority dating from March 15, 1897, which appropriations were subsequent in point of time and inferior and junior in right to the appropriation of The Farmers Canal Company to 1142-6/7 cubic feet of water per second of time.

XI.

Admits that all of its co-defendants save only the Gering Irrigation District and the Steamboat Ditch Company filed with the Secretary of the State Board of Irrigation of the State of Nebraska prior to the 7th day of April 1907 their respective claims for the use of

water from the North Platte River; admits that the Secretary of the State Board of Irrigation made inquiries and took evidence and rendered a separate opinion on each of said claims and admits that on the 7th of April 1907 the said Board of Irrigation caused a resolution to be entered on its records affirming all of the opinions rendered by the said Secretary of the State Board of Irrigation prior to that date adjudicating the various priorities and the date thereof of the several claimants as hereinbefore recited and set forth.

XII.

Admits that during each and every month of each and every irrigation season with the exception of a short time during extremely low water, there had been sufficient quantity of water flowing down the channel of said river to the headgate of the canal of plaintiff to supply a sufficient quantity of water to be diverted into said canal to irrigate all of said lands.

XIII.

Admits that on or about the 31st day of August 1887 a corporation known as The Farmers Canal Company was duly organized and incorporated under the laws of the State of Nebraska and ever since said time has been and now is a corporation and that in the spring of 1888 said Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte River at a point on said river in Scotts Bluff County, Nebraska, where the west line of section 10, township 23 north, range 58 west intersects the north bank thereof for irrigation purposee; and that said point is about six miles up the river from the headgate of plaintiff's canal.

And this defendant alleges that the Farmers Canal Company duly posted its notice at the point of diversion on said River on September 16, 1887 and the same was on said day duly filed and recorded in the office of the County Clerk of said County; and began its work upon its canal about the 1st day of March 1888 and continued to work upon the same until about November 1, 1893; that it erected a substantial headgate of sufficient size and capacity to irrigate 80,000 acres of land for which its appropriations were made, and expended in the erection thereof and in the construction of said ditch more than \$80,000.00 to-wit about the sum of \$100,000.00. That said canal was excavated the full width for about the distance of a mile from the headgate and for a distance of about nineteen miles farther at about half the full size and that in addition thereto it excavated portions below the end of the completed canal for about twenty-five miles, making altogether about thirty-eight miles of ditch so excavated by it; all of which was completed by November 1, 1893; and that subsequently no actual construction work was done upon said canal by the Farmers Canal Company, except from time to time to make certain repairs.

That in order to procure funds for the carrying on of its enterprise, said Farmers Canal Company issued its bonds and gave a

mortgage to secure the same upon its canal, ditch, water rights, franchise and other property; which mortgage was foreclosed in the Circuit Court of the United States for the District of Nebraska in 1901 and the property water rights, privileges and franchises of said Farmers Canal Company conveyed to one Roberts Walker, who purchased all of said rights, privileges, franchises, immunities, claims appropriations and rights in and to the waters of said North Platte River, and became the owner thereof, at the master's sale under and by virtue of said decree.

That on the 14th day of April 1902, and after the sale of said rights, property, immunities, franchises and privileges of the said Farmers Canal Company to said Roberts Walker and after confirmation of said sale by the court, one William Frank filed in the office of the Secretary of the State Board of Irrigation his application for 2,200 cubic feet of water per second of time from the North Platte River, for irrigating and other beneficial purposes proposing to construct a canal 150 miles long and to irrigate 150,000 acres of land: the point of the diversion of the water and the line of the proposed canal being substantially that of the Farmers Canal Company; and at the hearing before the State Board of Irrigation upon said application, protests were filed by the Farmers Canal Company; and at the hearing before the State Board of Irrigation upon said application, protests were filed by the Farmers Canal Company and Roberts Walker who claimed to have a prior appropriation of water to irrigate the same lands for a distance of 81 miles under the proposed canal, and an opinion and order was rendered which confirmed the rights of the Farmers Canal Company and Roberts Walker so far as the same appears in the previous order of the Board of Irrigation, hereinabove referred to, and granted the application of said William Frank, subject to the rights of the Farmers Canal Company and Roberts Walker under the order aforesaid; from which order an appeal was taken and the cause ultimately reached the Supreme Court of the State of Nebraska where on June 9, 1904 the order of the said Board of Irrigation confirming the rights of the Farmers Canal Company and Roberts Walker to 1,142 $\frac{6}{7}$ cubic feet of water per second of time, was affirmed.

Admits that afterwards and on or about the 20th day of October 1904, said Roberts Walker sold and conveyed all the property rights, privileges, immunities and franchises which had been conveyed to him under said decree of foreclosure, to the Tri State Land Company, a corporation duly organized and existing under the laws of the State of New Jersey.

XIV.

Admits that no work was done upon said canal during the time the foreclosure thereof was pending in the Circuit Court of the United States and during the further period when the appeal of said William Frank from the order of the State Board of Irrigation was pending in the District Court and Supreme Court of the State of Nebraska. Admits that after the property passed to the Tri

State Land Company and during the summer of 1906 the Tri-State Land Company did enlarge said canals at the headgate and for some distance below, to a width of 90 feet at the bottom and a depth of 11 feet and did unite the detached portions of said canal with each other and with the completed portions of said canal and so extended and completed said canal in an easterly direction, for a distance of about forty miles from said headgate, so as to make it capable of irrigating 40,000 acres of land; and in 1907 resumed and continued work upon said canal and completed the same to a distance of sixty miles from its headgate so as to make it capable of irrigating 60,000 acres of land under said canal.

This defendant further alleges that ever since it became the owner of said property, rights, privileges, immunities and franchises as the grantee of said Roberts Walker and the Farmers Canal Company, this defendant has claimed and still claims the right to 1,142 $\frac{6}{7}$ cubic feet of water per second of time continually flowing through its irrigating canal and ditches, to be taken by it from the North Platte River, with a priority dating from September 16, 1887, and that in good faith and believing itself to possess such right it had constructed and fully completed said canal from the original point of diversion on the North Platte River to the original terminus as intended at the time of making said appropriation and as designated at the time of filing its claim with the State Board of Irrigation under which its adjudication to an appropriation of 1,142 $\frac{6}{7}$ cubic feet of water per second of time was allowed; and has erected a large substantial and permanent needle dam across the North Platte river for the purpose of diverting water from said river into its canal to the extent of its right and claim of 1,142 $\frac{6}{7}$ cubic feet of water per second of time and has so completed its said canal by extension so as to irrigate all of the land for which the said 1,142 $\frac{6}{7}$ cubic feet of water were originally appropriated and claimed by its *meane* grantor the Farmers Canal Company and heretofore adjudicated to it by the said State Board of Irrigation.

That in the prosecution of its enterprise and the building of its canals, laterals, headgates, settling pools, intake, the bridging of highways and other necessary improvements it has expended upwards of \$2,500,000 claiming publicly all the time to have a right to take 1,142 $\frac{6}{7}$ cubic feet of water per second of time from the waters of the North Platte River, with a priority dating from September 16, 1887, and prior to that of either the plaintiff or the defendants, all of which said plaintiff and defendants well knew; and said plaintiff and defendants knowing of said claim of this defendant, and of its prior right to said water, and knowing of the expenditure of the sums of money aforesaid in the construction of its canal, made no claim whatever to a right to the use of the said water prior to that of this answering defendant, but stood by allowing said defendant to expend its money in the belief and claim that it had a right to said 1,142 $\frac{6}{7}$ cubic feet of water, with a priority dating from September 16, 1887.

XV.

Admits that on or about the 17th day of July, 1896, the
165 Secretary of the State Board of Irrigation of the State of
Nebraska, made certain inquiries and took evidence regard-
ing the right of the Farmers Canal Company to appropriate water
from the North Platte River; admits that afterwards and on or
about the 19th day of September 1896, said Farmers Canal Com-
pany filed in the office of the Secretary of the State Board of Irriga-
tion its claim for an appropriation of water from the North Platte
River to the extent of 275,000 miners' inches; admits that on or
about the 9th of January 1897 the Secretary of the State Board of
Irrigation rendered an opinion on the claim of the said Farmers
Canal Company in which he found and determined that said ditch
or canal heads on the North bank of the North Platte River in the
southwest quarter of the southeast quarter of Section 3, township
23 north, range 58 west; that said ditch is about 81 miles in length;
and said ditch covers and reclaims certain lands in said opinion de-
scribed amounting in all to about 80,000 acres; and that the priority
of appropriation dated from the 16th day of September 1887.

Admits that while the said opinion undertook to limit the time
to September 1, 1904, for completing the application of water to
the beneficial use permitted by said opinion, neither the said Sec-
retary nor the State Board of Irrigation had any power or author-
ity so to do; and its order limiting said time being beyond its power,
was and is null and void and was so adjudicated by the Supreme
Court of the State of Nebraska in an issue presented for its determi-
nation; admits that the appropriation confirmed to the Farmers
Canal Company by said order was 1,142 $\frac{6}{7}$ cubic feet of water
per second of time, with a priority dating from September 16, 1887.

XVI.

Admits that a resolution was duly entered on the 7th of April
1897 by the State Board of Irrigation confirming the opin-
166 ion of its Secretary on the claim of the Farmers Canal Com-
pany and the other claimants hereinbefore referred to and
set out; and alleges that no appeal was taken therefrom, and the
same is in full force and effect.

XVII.

Admits that at the time the Secretary of the State Board of Irriga-
tion rendered its opinion above referred to, and at the time the said
Board of Irrigation passed the resolution above referred to, affirm-
ing the opinion of its said Secretary, said The Farmers Canal Com-
pany had no constructed its canal 81 miles in length and the claim
filed by said The Farmers Canal Company upon its face showed that
it had constructed only a portion of said canal; but this defendant
alleges that it and its predecessors in interest have at all time
claimed such right of appropriation to 1,142 $\frac{6}{7}$ cubic feet of water
per second of time, with a priority dating from September 16, 1887.

and superior to the right of either plaintiff or its co-defendants, and that it has at all times since becoming the owner of said water rights, canal, privileges, franchises and property proceeded to build and complete its ditch as rapidly as its finances would warrant.

XVIII.

Admits that said Farmers Canal Company and The Tri-State Land Company, claim to have acquired a right to appropriate from the North Platte River 1,142 $\frac{6}{7}$ cubic feet of water per second of time, with a priority dating from the 16th day of September 1887; admits that said Companies have through their duly authorized officers and agents at various times asserted and declared that they have a right of appropriation of water from the North Platte River to the extent of 1,142 $\frac{6}{7}$ cubic feet per second of time continually flowing during the irrigation season of each and every year, which is prior to the right of appropriation acquired by said plaintiff or the co-defendants named herein.

167 And this defendant further alleges that while it had at all times claimed an appropriation of 1,142- $\frac{6}{7}$ cubic feet of water per second of time, it has in each succeeding year during its building operations, applied more and more of its appropriated waters, as its ditches, laterals and canals, have been extended and brought more land under its said ditch and made the same possible of irrigation; and that in order to secure to itself the full amount of its appropriation and grant, to-wit, 1,142- $\frac{6}{7}$ cubic feet of water per second of time it did at great expense and at the expenditure of large sums of money build a permanent needle dam on a steel and concrete base and frame; and in its canal and about a mile below the headgate thereof, it built a large wasteway of concrete reinforced with structural steel, into which it diverts the water of said river and from which wasteway it takes out 1,142- $\frac{6}{7}$ cubic feet of water per second of time and flows the same on into its canal and out of said wasteway forces the sand, mud and surplus water back into the North Platte River at a point about one mile below its needle dam in said river, which said needle dam and the concrete settling pool were constructed and completed prior to the filing of the petition herein by said plaintiff.

XIX.

Admits that during the greater portion of the irrigation season of 1910 said Tri-State Land Company did divert from said river several hundred cubic feet of water per second of time, but which amount was less than 1,142- $\frac{6}{7}$ cubic feet of water; admits that the said State Board of Irrigation when applied to by plaintiff, refused to limit or restrict this answering defendant or the Farmers Canal Company or either of them in the diversion of water from said stream to any quantity less than 1,142- $\frac{6}{7}$ cubic feet per second of time; but on the contrary, said State Board of Irrigation caused the headgate of the plaintiff herein to be closed down and refused to permit any water to flow through or into its said canal, while at the same time it allowed the Farmers Mutual Canal

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Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of 1,142-6/7 cubic feet of water per second of time.

XX.

Admits that the Mitchell Irrigation District, The Gering Irrigation District, The Ramshorn Ditch Company, The Winters Creek Irrigation Company, The Alliance Irrigation Canal & Water Power Company, the Browns Creek Irrigation Company and the Belmont Irrigation Canal and Water Power Company are each corporations organized and existing under and by virtue of the laws of the State of Nebraska; admits that said corporation and Charles E. Logan are owners of canals through which they have been appropriating and diverting water for irrigation purposes with headgates located in said river below the headgate of plaintiff.

XXI.

And these defendant deny each and every other allegation in said amended and supplemental petition contained not hereinbefore specifically admitted.

THE TRI-STATE LAND COMPANY AND
FARMERS MUTUAL CANAL COMPANY,
By C. C. FLANSBURG &
WRIGHT, DUFFIE & WRIGHT,
Its Attorneys.

STATE OF NEBRASKA,
Scotts Bluff County, ss:

F. A. Wright on oath says that he is one of the duly authorized attorneys of the Tri-State Land Company which Company is a corporation; that he has read the above and foregoing answer and the facts therein contained are true as he verily believes.

F. A. WRIGHT.

Subscribed in my presence and sworn to before me this 20th day of October 1910.

M. H. McHENRY,
Clerk Dist. Court.

169 And afterwards, on the 30th day of January 1911 there was filed in the office of said Clerk an answer and amended and supplemental cross-petition of the Nine Mile Irrigation District in the words and figures following, to-wit:

In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-partnership under the Firm Name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemental Cross-petition.

Comes now the above named defendant, the Nine Mile Irrigation District, and for answer to the amended and supplemental petition of the plaintiff herein alleges: First. This defendant admits the allegations contained in paragraphs 1 to 9 inclusive, 11 to 21 inclusive, 23 to 26 inclusive, and 28, of said amended and supplemental petition; and all other allegations in said amended and supplemental petition contained that are hereafter affirmatively stated in the cross petition of this defendant.

170 This defendant denies each and every other allegation in said amended and supplementary petition contained, except such allegations as are hereinafter admitted or qualified.

Amended and Supplemental Cross Petition.

For its amended and supplemental cross petition against the plaintiff and the other defendants to this action, this defendant, for and on behalf of itself and the users of water from its canal, hereinafter described, alleges:

First. That on or about the 26th day of August 1890, the Bayard Irrigation Canal and Water Power Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, posted two certain notices upon the north bank of the North Platte river, bearing south 2 degrees and 18 minutes and east 1,349 feet from the $\frac{1}{4}$ corner of sections 17 and 18, township 21 north, range 53 west of the Sixth Principal Meridian in Scotts Bluff County, Nebraska, of its intention to appropriate and divert a sufficient quantity of water from said river at said point to fill a canal 45 feet wide on the bottom and 6 feet in depth, said water to be conducted through said canal in an easterly direction a distance sufficiently far to water

40,000 acres of land. Said notice was filed for record in the office of the county clerk and recorder of Scotts Bluff County, Nebraska.

Second. That in the fall of 1890 the Bayard Irrigation Canal and Water Power Company commenced the construction of said canal from said point of diversion and prosecuted the same off and on during the winter and also during the season of 1891, at which time, owing to financial difficulties and other causes, work was suspended until the year 1893.

Third. That during the year 1893 the Nine Mile Canal and Reservoir Company was organized as a corporation under and by virtue of the laws of the state of Nebraska, at which time the Bayard Irrigation Canal and Water Power Company conveyed all its rights title and interest in and to said canal, and all its franchises and
171 water rights, to the Nine Mile Canal and Reservoir Company.

That on the 6th day of December, 1893, the Nine Mile Canal and Reservoir Company posted another and additional notice at the point above described for the appropriation of water to the extent of 240 cubic feet per second of time under a 4-inch pressure, for the purpose of irrigation, water power and domestic uses. That immediately after posting said notice the Nine Mile Canal and Reservoir Company began the construction of said canal and prosecuted the same continuously until 12 miles of said canal was completed.

Fourth. That during the irrigation season of 1895 the Nine Mile Canal and Reservoir Company conducted water through said canal from the North Platte river to lands hereinafter described, that being the place of intended use, and continued to conduct water through the same during the balance of each and every irrigation season. That the construction of said canal was continued until 9 miles additional of the same was completed, in the year 1898. That said canal when completed was one foot on depth at the headgate, 40 feet wide on the bottom and 58 feet wide on the top, with a grade of 2 feet per mile. That one-fifth of a mile below the headgate said canal was $1\frac{1}{2}$ feet deep, 20 feet wide on the bottom and 31 feet wide on the top, with a grade of 2 feet per mile. At three miles below the headgate said canal was 2 feet deep, 16 feet wide on the bottom and 21 feet wide on the top, with a grade of 2 feet per mile. At $6\frac{1}{2}$ miles below the headgate said canal was 2 feet deep, 12 feet wide on the bottom and 16 feet wide on the top, with a grade of 2 feet per mile. At $11\frac{1}{2}$ miles below the headgate said canal was 2 feet deep, 10 feet wide on the bottom and $15\frac{1}{2}$ feet wide on the top, with a grade of 2 feet per mile; and passes through the following described lands, to wit: The N. E. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of section 18; Section 17; S. W. $\frac{1}{4}$ of section 16; N. W. $\frac{1}{4}$ of section 16; N. E. $\frac{1}{4}$ of section 16; S. W. $\frac{1}{4}$ of section 10; N. E. $\frac{1}{4}$ of section 15; N. W. $\frac{1}{4}$ of section 14; S. W. $\frac{1}{4}$ of section 14; S. E. $\frac{1}{4}$ of section 14; S. $\frac{1}{2}$ of section 13; all in township 21 north, range 53 west; N. W. $\frac{1}{4}$ of section 19; S. E. $\frac{1}{4}$ of section 19, S. W. $\frac{1}{4}$ of section 20, N. W. $\frac{1}{4}$ of section 29, and section 36, all in township 21, north, range 52 west; N. $\frac{1}{2}$ of section 2 and N. $\frac{1}{2}$ of section 1, township 20 north range 51 west; sections 31 and 32, S. W.
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$\frac{1}{4}$ of section 33, all in township 21 north, range 50 west; N. E. $\frac{1}{4}$ of section 6, sections 5 and 4 all in township 20 north, range 51 west.

Fifth. That a portion of the land subject to irrigation from said canal was irrigated during the season of 1895, and the amount of land irrigated therefrom was increased each year thereafter until all of the land subject to irrigation from said canal was reclaimed, and that all of the said lands had been reclaimed by means of said canal in the year 1900, and all of said lands have been irrigated from said canal during each and every year thereafter. Said lands are described as follows: The S. $\frac{1}{2}$ of section 17, part of N. W. $\frac{1}{4}$ of section 20, part of section 16, all that portion of section 21 north of the North Platte river, part of S. W. $\frac{1}{4}$ of section 10 south of the Nine Mile canal, part of section 15 south of the Nine Mile canal, section 22, part of section 27 north of the North Platte river, part of section 14 south of the Nine Mile canal, section 23, part of section 26 north of the North Platte river, part of section 13 south of the Nine Mile Canal, section 24, part of section 25 north of the North Platte river, all in township 21 north, range 53 west; part of section 19 south of the Nine Mile canal, section 30, part of section 31 north of the North Platte river, part of section 29 south of the Nine Mile canal, part of section 32 north of the North Platte river, part of section 28 south of the Nine Mile canal, section 33, part of section 27 south of the Nine Mile canal section 24, part of section 35

173 south of the Nine Mile canal, part of section 36 south of the Nine Mile canal, all in township 21 north, range 52 west; part of section 6 north of the North Platte river, section 5, part of section 8 north of the North Platte river, section 4, part of section 9 north of the North Platte river, section 3, section 10, part of section 2 south of the Nine Mile canal, section 11, part of section 14 north of the North Platte river, part of section 1 south of the Nine Mile canal, section 12, part of section 13 north of the North Platte river, all in township 20 north, range 52 west; part of section 31 east of the Nine Mile canal, part of section 32 south of the Nine Mile canal, part of section 33 south and west of the Nine Mile canal, all in township 21 north, range 51 west; part of section 6 south of the Nine Mile canal, section 7 part of section 18 north of the North Platte river, part of section 5 south of the Nine Mile canal, section 18, part of section 17 north of the North Platte River, part of section 4 south of the Nine Mile canal, section 9, and section 16, all in township 20 north, range 51 west of the Sixth principal meridian; all of said lands being located between the North Platte river and said canal.

Sixth. That on the — day of — 1— this cross-petitioner, the Nine Mile Irrigation District, was organized under the provisions of an act of the legislature of the State of Nebraska entitled "An Act to provide for the organization and government of irrigation districts, and to provide for the acquiring of canals already built or partly constructed, for the acquiring of right of way to build irrigation ditches or canals and other property, for the dividing of certain portions of the territory of the state of Nebraska into irrigation districts, and for said irrigation districts to vote bonds for the purpose of constructing irrigation canals, for the purpose of buying and purchasing by said irrigation districts certain canals already con-

structed or partially constructed and paying for the same; providing for a system of revenue to be raised by taxation upon the property in said districts, and the manner in which the same shall be
174 done; and holding of elections in said districts for the purpose of electing officers and providing for the management of said districts; also providing for the increase and enlargement of said districts whenever it becomes necessary or best to increase their size."—Approved March 26, 1895. That said district embraced and included therein, and still embraces and includes all of the above described lands, and ever since said time has been and now is a corporation duly organized and existing under and by virtue of the provisions of said act of the legislature of the state of Nebraska.

Seventh. That on the — day of — 1— the Nine Mile Canal and Reservoir Company sold and conveyed to the Nine Mile Irrigation District, cross-petitioner herein, its said canal above described and all the water rights, franchises, privileges, immunities and property of every nature and description theretofore acquired by it, and ever since said time said The Nine Mile Irrigation District has been and now is the owner of the same.

Eighth. That by virtue of the performance of the acts above enumerated by this crosspetitioner and its grantor, said crosspetitioner has acquired and is now the owner of a right to divert and appropriate from the North Platte river a sufficient quantity of water for the irrigation of the above described lands, to-wit 200 cubic feet of water per second of time, continuously flowing through each and every irrigation season, with a priority dating from the date of posting the notice above mentioned, to-wit the 28th day of November, 1890.

Ninth. This cross-petitioner further avers that on or about the 31st day of May 1895, the county clerk of Scotts Bluff county caused a transcript of the above mentioned notice to be filed in the office of the secretary of the State board of Irrigation of the State of Nebraska, and that thereafter the said secretary of the
175 State Board of Irrigation forwarded to the Nine Mile Canal and Reservoir Company a blank "Claim for the Waters of the State of Nebraska" which was thereafter filled out and returned to the office of the secretary of the state board of irrigation and filed in said office on the 12th day of August, 1895. That on or about the 17th day of July 1896, the secretary of the state board of irrigation made certain inquiry and took certain evidence regarding the claim of the Nine Mile Canal and Reservoir Company, and on the 8th day of January 1897, the said secretary of the state board of irrigation rendered an opinion on said claim and made the same a matter of record in his office, in which he, the said secretary, found and determined that the Nine Mile Canal and Reservoir Company had constructed a ditch as stated in this cross petition, that said ditch or canal covered and reclaimed the land herein described, and that the priority of the appropriation of the said Nine Mile Canal and Reservoir Company dated from the 6th day of December, 1893.

Tenth. This crosspetitioner further avers that the said opinion of the secretary of the state board of irrigation contained no finding whatever regarding any other appropriation or claim for the use of

water from said stream. Nor did said opinion determine or find that any other person, company, corporation of party was entitled to appropriate any water whatever from said stream either prior or subsequent to said Nine Mile Canal and Reservoir Company. Nor did said opinion contain any finding whatever as to the relative priorities of the various appropriators of water from said stream. That said Nine Mile Canal and Reservoir Company had no notice that any person, company or corporation claimed the right to appropriate water from said stream prior to the said Nine Mile Canal and Reservoir Company.

176 Eleventh. This crosspetitioner further avers, on information and belief, that several other claimants for the use of water from the North Platte river had, prior to the 8th day of January, 1897, filed with the secretary of the state board of irrigation of the state of Nebraska their respective claims for the use of water from the North Platte river. That the secretary of the State Board of Irrigation, after making such ex parte inquiry and taking such evidence ex parte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims. That no claimant for water from the said river had any notice whatever of the claims for water filed by others. Nor had any claimant for water from said river any notice of the opinions of the secretary of the state board of irrigation on the other claims for water from the said river. That on the 7th day of April, 1897, the state board of irrigation, without any notice to the claimants of appropriation of water from said river, or any of them, and without the knowledge of this crosspetitioner or its grantor, caused a resolution to be entered on its records affirming all opinions rendered by said secretary of the state board prior to that date including the opinion rendered on the claim of this crosspetitioner.

Twelfth. This crosspetitioner further avers that neither it nor its grantor had any notice, knowledge or information concerning the various opinions rendered by said secretary of the state board of irrigation prior to the 7th day of April, 1897, on the claims of others for rights to the use of water from the North Platte river, or any of them, or of the passage of the above mentioned resolution affirming said opinions; and neither this crosspetitioner nor its grantor acquired any knowledge of said action for several years thereafter, nor until shortly prior to the commencement of this action; and neither this crosspetitioner nor its grantor had any notice or information that the state board of irrigation ever intended to do anything
177 more than make a record of the claim of this crosspetitioner in its office.

Thirteenth. That during each and every month of each and every irrigation season there has been a sufficient amount of water flowing down the channel of said river to the headgate of the canal of this crosspetitioner to supply a sufficient quantity of water to be diverted into said canal to irrigate all of the lands above mentioned. That prior to the time said lands were irrigated they were, on account of insufficient moisture and rainfall desert in character and incapable of producing crops; but since irrigating the same they have become very productive and valuable and have been brought to a high state

of cultivation. That since the application of water to said lands through and by means of said canal they have been used in raising various kinds of vegetables, grains, hay, and other crops adapted to the climatic conditions of the country. That some of said lands have been planted to alfalfa, and some to shrubbery and trees, which are all in good flourishing condition owing to the fact that they have been irrigated and it is absolutely necessary to continue to irrigate the same during the various months of each irrigation season in order to preserve said crops, trees and shrubbery from ruin and destruction. That without irrigation said land would become practically valueless and the prosperous homes now located thereon would be destroyed and ruined.

Fourteenth. Crosspetitioner further avers that on or about the 31st day of August, 1887, a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the State of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of the said state. That in the spring of 1888 said Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte river at a point on said
178 river in Scotts Bluff county, Nebraska, where the west line of Section 10, Township 25 north, Range 58 west intersects the north bank thereof, for irrigation purposes. That said point of diversion of the Farmers Canal Company is about 50 miles up the river from the headgate of the canal of this crosspetitioner. That said The Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said company ceased work thereon. That at said time there were not more than 1,500 acres of land susceptible to irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 1,000 to 1,200 acres of land. That said company did not again resume work on said canal until the spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the summer of 1893, when it again ceased work on said canal. That when said company ceased work on said canal in 1893 it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about 2,500 or 3,000 acres of land. That as completed in 1893 there were not more than 2,000 acres of land susceptible to irrigation from said canal and said company and its grantees never irrigated more than 2,000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2,000 acres of land. That on or about the 23rd day of December 1901, said canal of the Farmers Canal Company, together with all its property, rights and franchises, was sold under a decree of foreclosure to one Roberts Walker, who on or about the 20th day of October, 1904, sold and conveyed the same to the Tri-State Land Company, one of the defendants above named, which

is a corporation organized and existing under and by virtue of the laws of the state of New Jersey.

Fifteenth. That no further work was done on said canal from the time that the Farmers Canal Company ceased work thereon in the year 1893 until the defendant, the Tri-State Land Company, commenced to enlarge and extend the same in September, 1906. That said defendant, the Tri-State Land Company, prosecuted work thereon from September, 1906, until the fall of 1907, and did enlarge said canal at the headgate and for some distance below the headgate to a width of 90 feet at the bottom and depth of 11 feet, and did extend the same in an easterly direction for a distance of about 40 miles from the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land. That prior to the commencement of this action said Tri-State Land Company entered into a contract with the Farmers Mutual Canal Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, whereby said Tri-State Land Company agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal water rights, appropriations and franchises of said Tri-State Land Company, and plaintiff is informed and believes and on such information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal together with all water rights, appropriations and franchises acquired by it to said The Farmers Mutual Canal Company, receiving in payment therefor all the capital stock of The Farmers Mutual Canal Company, a majority of which said capital stock said Tri-State Land Company still owns and controls. That the Tri-State Land Company and said Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 or 40 miles, so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said companies intend to divert and appropriate water through said canal from the North Platte river, which is the only source of supply of the canal of the said crosspetitioner herein.

Sixteenth. This crosspetitioner further avers on information and belief that on or about the 17th day of July, 1896, the secretary of the state board of irrigation of the state of Nebraska made certain inquiries and took certain evidence regarding the right of The Farmers Canal Company to appropriate water from the North Platte river; that thereafter and on or about the 19th day of September, 1896, said Farmers Canal Company filed in the office of the secretary of the state board of irrigation of the state of Nebraska its claim for an appropriation of water from the North Platte river to the extent of 275,000 miners' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres; that thereafter and on or about the 9th day of January, 1897, the secretary of the state board of irrigation did render an opinion on said claim and made the same a matter of record in his office, in which opinion he, the said secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte river in the southwest quarter of the southeast quarter of section 3, township 23 north, range 58 west; that said ditch is

about 81 miles in length; that said ditch or canal covers and reclaims certain lands in said opinion described, amounting in all to about 80,000 acres; that the priority of the appropriation dated from the 16th day of September, 1887. Said opinion further stated that the claim of said The Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1. The water appropriated shall be used for the purpose of irrigation.

2. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3. The amount of the appropriation shall not exceed eleven hundred forty-two and six sevenths (1142-6/7) cubic feet per second of time; neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and further, said appropriation under any circumstances shall be limited to one-seventieth (1/70) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904.

But said opinion contained no finding whatever as to the relative priorities of the various appropriators of water from said stream.

Seventeenth. This crosspetitioner further avers on information and belief that on the 7th day of April, 1897, the state Board of irrigation caused a resolution to be entered on its records affirming the opinion of the secretary of the state board of irrigation on the claim of the Farmers Canal Company above mentioned, and other opinions rendered by said secretary prior to said date.

Eighteenth. This crosspetitioner further avers that at the time the secretary of the state board of irrigation rendered the opinion above referred to, and at the time the said state board of irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of 80,000 acres of land, nor any part thereof, except about 2,000 acres; that at said time said company had not acquired a right to appropriate 1142-6/7 cubic feet of water per second of time from said river, nor any part thereof, except about 28 cubic feet of water per second of time; and said opinion and said resolution are erroneous and false in said particulars.

182 Nineteenth. This crosspetitioner further avers that neither the Nine Mile Irrigation District nor its grantors had any notice whatever of the filing of said claim of the Farmers Canal Company, or of any hearing thereon or inquiry with reference thereto, or of the opinion of the secretary of the state board of irrigation thereon, or of the resolution entered upon the records of said board affirming said opinion; nor did this crosspetitioner or its grantor acquire any knowledge whatever of the above mentioned transactions of said board and its secretary for several years after they had taken place; that no copy of said opinion and resolution,

or either of them, was ever at any time delivered to this crosspetitioner or to its grantor, or filed in the office of the county clerk of Scotts Bluff County, Nebraska; nor was any certificate signed by the president of said board and attested by the secretary or otherwise, containing the name or the postoffice address of said company, or the priority of its appropriation, or the amount of water appropriated by it, or the amount of prior appropriations, or any other information with reference to said claim of said The Farmers Canal Company, ever transmitted to the county Clerk of Scotts Bluff county, Nebraska, or to the county clerk of any other county in Nebraska; nor was any such certificate with reference to the appropriation of this crosspetitioner ever transmitted to the county clerk of said county or the county clerk of any other county. That neither this crosspetitioner nor its grantor was given any opportunity whatever of appearing before the state board of irrigation or its secretary for the purpose of showing the actual facts with reference to said claim of The Farmers Canal Company, and said opinion and resolution are therefore absolutely null and void.

Twentieth. This crosspetitioner further avers that neither the Farmers Canal Company nor its grantees, nor either of them ever appropriated or applied to a beneficial use, prior to the year 1909, more than 28 cubic feet of water per second of time. Yet notwithstanding this fact, the Tri-State Land Company and The 183 Farmers Mutual Canal Company, claim to have acquired, through and under The Farmers Canal Company, a right to appropriate from the North Platte river 1142-6/7 cubic feet of water per second of time with a priority dating from the 16th day of September, 1887; and said companies have through their duly authorized officers and agents at various times asserted and declared that they have a right of appropriation of water from the North Platte river to the extent of 1142-6/7 cubic feet of water per second of time, continually flowing during the irrigation season of each and every year, which is prior to the right of appropriation acquired by this cross-petitioner, and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the canal of this cross-petitioner, for the purpose of intercepting and diverting into said canal said quantity of water, or so much thereof as may be flowing in said river.

Twenty-first. This crosspetitioner further avers that during the greater portion of the irrigation season of 1910 said Tri-State Land Company and The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of 28 cubic feet of water per second, and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of this cross-petitioner much below the quantity of water which this crosspetitioner was entitled to divert from said river. That notwithstanding the fact that the state board of irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said board, and notwithstanding the fact that no adjudication was in fact made by said board of the relative rights of this crosspetitioner and

the other parties to this action, yet because of the rendering of the opinion above mentioned by the secretary of the state board of irrigation and the passage of the resolution above mentioned said state board of irrigation refused to limit or restrict said Farmers Mutual Canal Company and Tri-State Land Company, or either of them in the diversion of water from said stream to 28 cubic feet of water per second of time, or to any quantity of water less than 1142-6/7 cubic feet per second of time; but on the contrary said state board of irrigation caused the headgate of the canal of this crosspetitioner to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed The Farmers Mutual Canal Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of 1142-6/7 cubic feet of water per second of time. That during all of the time that the headgate of the canal of this crosspetitioner was closed by the state board of irrigation as aforesaid, said Farmers Mutual Canal Company and the Tri-State Land Company were diverting several hundred cubic feet of water per second of time from said river, which included 200 cubic feet of water per second of time which this crosspetitioner was entitled to have flow into and through its said canal for the irrigation of land subject to irrigation therefrom.

Twenty-second. This crosspetitioner further avers that to give the Farmers Mutual Canal Company or its grantors a priority over the crosspetitioner herein to the use of water to the extent of 1142-6/7 cubic feet of water per second of time would be to deprive this crosspetitioner and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law, in violation of Section 1 of Article V and Section 1 of Article XIV of the Amendments to the Constitution of the United States. That said opinion and said resolution above referred to constitute a cloud on this crosspetitioner's title to an appropriation of water from said stream, and unless said cloud is cleared by a decree of this court the state board of irrigation will continue in the future as it has in the past to refuse to grant this crosspetitioner or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of the said stream by The Farmers Mutual Canal Company and the Tri-State Land Company, and will permit said companies to divert all of the water of said stream during times of scarcity, to the entire exclusion of this crosspetitioner and the users of water from its canal.

Twenty-third. That the average flow of water in said river at or near the headgate of the canal of this crosspetitioner and that of the defendants, The Farmers Mutual Canal Company and the Tri-State Land Company, during part of July and during all of August, September, October and November has been for years last past, and will be in the future, much less than the amount of water which said defendants, The Farmers Mutual Canal Company and the Tri-State Land Company, claim a right to divert and appropriate prior to the right of this crosspetitioner, and if said companies be permitted to

divert 1142-6/7 cubic feet of water per second of time prior to the cross-petitioner herein the said crosspetitioner and the users of water from its canal will be deprived of the use of water for irrigation purposes during the latter part of the month of July and during the months of August, September, October and November of each year, to the irreparable damage and injury of said crosspetitioner and the users of water from its canal.

Twenty-fourth. This crosspetitioner further avers that the claim of The Farmers Mutual Canal Company and the Tri-State Land Company to the right to appropriate 1142-6/7 cubic feet of water per second of time from the North Platte river during each and every irrigation season is unfounded in truth and in fact. That neither The Farmers Mutual Canal Company, the Tri-State Land

Company, nor its grantors, nor either of them, ever acquired
186 a right to appropriate from said river any amount of water whatsoever except a sufficient amount to irrigate about 2,000 acres of land, or 28 cubic feet of water per second of time, continuously flowing through each irrigation season. That all rights of appropriation acquired by said companies and their grantors to appropriate water from the North Platte river, if any right were acquired by said companies, or either of them, are subsequent, junior and inferior to the right of appropriation of water from said river acquired by this cross-petitioner. That if the said Tri-State Land Company or The Farmers Mutual Canal Company ever did, by virtue of any proceedings taken by said company or its grantors, or either of them, or otherwise, initiate a right of appropriation which upon application to a beneficial use would ripen into a right to appropriate water from said river, said rights so initiated, if any, have become lost to said The Farmers Mutual Canal Company and its grantors by non-use and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged right, if any right was in any manner ever initiated or acquired by said company or its grantors.

Twenty-fifth. This crosspetitioner further avers that in order to determine how much water the defendants, Tri-State Land Company, The Farmers Mutual Canal Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigating Company, and the Steamboat Ditch Company should permit to flow down the river to the headgate of the canal of this crosspetitioner, and to determine how much water plaintiff, the Enterprise Irrigation District, should permit to flow down the channel of said river to the headgate of the canal of this crosspetitioner, it will be necessary to determine

187 the quantity of water, if any, that this crosspetitioner may be compelled to permit to flow down the channel of said river to the headgates of the canals of the other defendants herein, and to judicially determine the relative rights of priority of all of the parties to this action.

Wherefore, this cross petitioner prays:

1. That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired to appropriate from said river and the relative priorities of said rights of appropriation.

2. That it be adjudged and decreed that this cross-petitioner has acquired a right of appropriation of water from the North Platte river to the extent of 200 cubic feet of water per second of time, continuously flowing during each and every irrigation season, with a priority dating from the 28th day of November 1890, and that said right is prior in time and prior in right to the rights of appropriation of the other parties to this action and each of them, and that the title to said right of appropriation of this cross-petitioner be quieted and confirmed in this cross petitioner as against the other parties to this action and each of them, and that the cloud cast on cross petitioner's title by reason of the opinion of the Secretary of the state board of irrigation and the resolution of said board confirming said opinion be removed.

3. That the defendants, The Farmers Mutual Canal Company, the Tri-State Land Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigating Company, and The Steamboat Ditch Company, and each of them, and the plaintiff. The Enterprise Irrigation District, be enjoined and restrained from decreasing or diminishing the flow of water in said river at the headgate of the canal of the cross petitioner herein below the amount of water which said cross petitioner has acquired a right to appropriate, to-wit, 200 cubic feet of water per second of time, continuously flowing during each and every irrigation season, and the amount of water if any, which it may be adjudged and decreed that the cross petitioner herein shall permit to flow down the channel of said river past its headgate.

4. That the cross petitioner herein be granted such other and further relief as may be just and equitable.

5. That this cross petitioner have and recover judgment for costs of this action.

THE NINE MILE IRRIGATION
DISTRICT,
By MORROW & MORROW.

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

George Gerwick being first duly sworn, deposes and says that he is the President of The Nine Mile Irrigation District, the cross petitioner herein; that he has read the foregoing answer and amended and supplemental cross petition and knows the contents thereof, and that the facts therein stated are true as he verily believes.

GEORGE GERWICK.

Subscribed in my presence and sworn to before me this 21 day of January A. D. 1911.

[SEAL.]

G. F. HAAS,
Notary Public.

My commission expires Jan. 6, 1916.

And afterwards on the 6th day of December 1910 there was filed in the office of the Clerk of the District Court of Scotts Bluff County, Nebraska, an answer and cross-petition of Winters Creek Irrigation Company in words and figures, following, to-wit:

189 In the District Court of Scotts Bluff County, Nebraska.

ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

TRI-STATE LAND COMPANY, FARMERS MUTUAL CANAL COMPANY, Mitchell Irrigation District, Rainshorn Ditch Company, Gering Irrigation District, Winter's Creek Irrigation Company, Central Irrigation District, Castle Rock Irrigation Canal and Water Power Company, Minatare Mutual Canal, Steamboat Ditch Company, Nine Mile Irrigation District, Alliance Irrigation Canal and Water Power Company, Chimney Rock Irrigation Canal and Water Power Company, Brown's Creek Irrigation Company, Charles E. Logan, Belmont Irrigation Canal and Water Power Company, and Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-partnership under the Firm Name of Lucerne Land Company, Defendants.

Answer and Cross-petition of Winter's Creek Irrigation Company.

Comes now the above named defendant Winter's Creek Irrigation Company, and for answer to amended and supplemental petition of plaintiff herein alleges:

This defendant admits the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, of said amended and supplemental petition. Admits the averments of paragraph 12 of said pleading. save that -his defendant alleges the Enterprise Ditch Company mentioned had actual knowledge and notice on the 7th day of January 1897, and long prior thereto that this defendant claimed and had exercised the right to appropriate water for irrigation uses from the North Platte river to the extent of 124 $\frac{2}{7}$ cubic feet per second of time of priority date senior to that of said Enterprise Ditch Company, and on information and belief further alleges that said Enterprise Ditch Company then had actual knowledge and notice that the Farmers Canal Company, predecessor in interest of defendants Tri-State Land Company and Farmers Mutual Canal Company, then claimed and had theretofore exercised the right to divert into The Farmers canal from said North Platte river water sufficient to irrigate 500 acres of land under said Farmers canal. and had applied and used for beneficial purposes

about ten cubic feet of water per second of time on said 500 acres as of priority date senior to that of said Enterprise Ditch Company, and senior to the date of this defendant's priority; also that the Minatare Canal and Irrigation Company, a corporation, predecessor in title of defendant Minatare Mutual Canal and Irrigating Company, then claimed and had exercised the right to divert into its Minatare canal and had appropriated for irrigation uses on lands under said canal a certain quantity of water, to-wit, about 150 cubic feet per second, under priority date senior to that of said Enterprise Ditch Company and senior to the priority of this defendant.

Admits the allegations of paragraphs 13, 14, 16, 17, 21, 22, 23, 24, 25 and 26 of said pleading. Admits the allegations contained in paragraphs 27 and 28 of said pleading, with the qualification that this defendant denies that plaintiff is unable to state and is not advised concerning the quantity of water which this defendant has acquired a right to appropriate from said river for irrigation uses of lands under said Winter's Creek canal, viz; to the extent of 124 $\frac{2}{7}$ cubic feet of water per second of time of priority date the 18th day of October, 1888, senior to the date of the priority of plaintiff, and also denies that defendants Mitchell Irrigation District, Gering Irrigation District and Ramshorn Ditch Company severally claim rights of appropriation from said river as prior or senior to 28 cubic feet of water per second of the Farmers Mutual Canal Company. This defendant denies each and every allegation in said petition contained, except such allegations as are hereinafter admitted or qualified.

For a cross-petition against the plaintiff and the other defendants to this action, this defendant for and on behalf of itself and the users of water from its canal hereinafter described, alleges:

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I.

That on or about the 18th day of October, 1888, this defendant then and ever since and now a corporation organized and existing under and by virtue of the laws of the State of Nebraska posted a notice at a point on the north bank of the North Platte river in what is now Scotts Bluff County, but then in Cheyenne County, Nebraska, in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 17, Township 22 north, Range 55 West of the 6th Principal Meridian, stating its intention to appropriate and divert a sufficient quantity of water from said river at said point to fill a canal of dimensions stated in said notice, sufficient to divert, conduct and distribute for irrigation of lands thereunder 172.5 cubic feet of water per second of time, to be constructed about 12 miles in length, running from said point in a general easterly and east-southeasterly course as stated in said notice, to irrigate lands therein described between its line and said river, to-wit; about 8,700 acres of land, requiring for irrigation said quantity of water; that on, to-wit: the 20th day of October, 1888, a copy of said notice was filed for record in the office of the County Clerk and Recorder of Cheyenne County, Nebraska, afterwards transcribed into records of Scotts Bluff County.

II.

That promptly after the posting of said notice this defendant caused said line of canal, thereafter known as Winter's Creek canal, to be surveyed and thereafter, beginning on the 15th day of November, 1889, and continuing with diligence until its completion the work of construction and excavation of said ditch was prosecuted until it was fully completed for its entire length of 12 miles, with capacity to divert, conduct and distribute on lands thereunder 172.5 cubic feet of water per second of time prior to the first day of May 1890.

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III.

That on or about the first day of May 1889, this defendant began, and throughout irrigating season of said year continued, to divert, conduct and distribute water from said river into, along and from said canal and applied the same to the beneficial irrigation of productive crops on some of the lands thereunder hereinafter described; that again, on or about the first day of May, 1890 and thenceforward during the irrigating season of each and every year from 1890 to 1910, both inclusive, this defendant constantly diverted into the headgate of said canal from said river and applied to the beneficial irrigation of productive crops on lands under its line, a constant flow of not less than 124.29 cubic feet of water per second of time, save that in every year during low water stages, only because of lack of supply in said river, the quantity diverted was for a short time slightly reduced. Prior to 1908 the diversion during each of said years into the Farmers Canal, now controlled by defendants Farmers Mutual Canal Company and the Tri-State Land Company, did not at any time exceed twenty-eight cubic feet of water per second of time under any claim of senior priority or otherwise; that the area of land between said Winter's Creek ditch and said river put under cultivation through irrigation was increased each year, so that on and prior to September 1, 1899, about 6,000 acres of said lands had been developed and irrigated into intensive agriculture and into productive crops annually requiring during irrigating seasons said entire flow of water. The area of irrigated land under said ditch since 1899 has been enlarged to embrace all of the lands under said ditch, to-wit 8,700 acres, but without increasing the diversion and quantity of water beneficially used for irrigation prior to the year 1897.

IV.

That said Winter's Creek canal of this defendant as completed on and prior to the first day of May 1890, was 12 miles long; in its course it passed through the following sections of land, viz: sections 17, 16, 15, 22, 23, 14, 13, and 24, in township 22 north, range 55 west of the 6th P. M., and sections 19, 20, 21, 28, 27, 26, and 35 in township 22 north, range 54 west

of 6th P. M.; that as so constructed the headgate of said canal at its point of intake from said river was 36 feet wide in the clear, that for a distance of 555 feet its width on bottom was 40 feet, and thence forward for three miles 24 feet; from the 3rd to the 6th mile, as water was distributed in laterals, said canal was gradually diminished in width, until at the end of the 6th mile from its headgate it was 20 feet wide, at $7\frac{1}{2}$ miles from its headgate 16 feet wide, and at its terminus 8 feet wide on bottom; that the width of said canal on top for the first 555 feet from its headgate was 51 feet, and thence for 3 miles 30 feet, then gradually reduced until at the end of the 6th mile it was 25 feet, at $7\frac{1}{2}$ miles from headgate 21 feet, and at its terminus 13 feet; that the depth of water carried in said canal for the first 3 miles was 3 feet, and for the remainder of its course $2\frac{1}{2}$ feet; that the grade of said canal was 1.58 feet per mile for the first 3 miles, and for the remainder of its course 2.11 feet per mile; that the total excavation of earth from said canal was 100,500 cubic yards; that since its completion said canal has since hitherto been maintained of said dimensions.

V.

That the lands under said canal which have been reclaimed and made productive of crops by means of irrigation from water supplied from said canal, are the following, to-wit: all the land lying between said canal and the North Platte river in sections 20, 21, 22, 23, 24, 25, 17, 16, 14, 13, 26, and 27, in township 22 north, range 55 west of the 6th P. M., and sections 19, 20, 21, 26, 27, 28, 194 29, 30, 31, 32, 33, 34, 35, and 36, in township 22 north, range 54 west of 6th P. M.; and in section 1, township 21 north, range 54 west of 6th P. M. in all containing 8,700 acres, in Scotts Bluff County, Nebraska.

VI.

That by virtue of the premises this defendant, for the benefit of its stockholders who are landowners under the line of its said canal, effected and became the owner of an appropriation and right to divert water from the North Platte river for irrigation of lands under its line of canal and for domestic purposes of occupants of said lands to the extent of 124.29 cubic feet of water per second of time under priority dating from the 18th day of October, 1888.

VII.

This defendant avers that on or about the 28th day of May, 1895, the County Clerk of Scotts Bluff County, Nebraska made a transcript of the above mentioned notice and transmitted the same to the office of the Secretary of the State Board of Irrigation of the state of Nebraska, in which office said transcript was filed by said Secretary on the 31st day of May, 1895; that thereafter the Secretary of said Board forwarded to this defendant a blank form of what was designated "Claim for the waters of the State of Nebraska" to be filled out giving the information required by said Board, as a

pleading to set in motion an adjudication of the appropriation of this defendant to the use of water from the North Platte river; that said blank form was duly filled out and verified on the 12th day of September, 1895, by Robert Harshman, the then Secretary, a stockholder and one of the directors of this defendant, authorized to make said affidavit of claim in behalf of the interests affected, and was by him caused to be filed for record in the office of the Secretary of

said State Board of Irrigation on the 16th day of September, 1895, under the claim No. 253, Division No. 1-A; that in and by said verified statement of claim all facts were shown as required by law and the rules and regulations of said Board to show a complete, vested appropriation of water to amount of 172.5 cubic feet per second from said North Platte river by means of said Winter's Creek canal, including the name of the claimant, this defendant, its postoffice address, that the water claimed had been used for purposes of irrigation, the name of the said ditch, the source of the water appropriation, the amount claimed, the location of its headgate as above mentioned, the length of said ditch actually constructed and completed, the sections of land through which said ditch ran, the dimensions of said ditch as hereinabove set forth, the excavation of yards of earth actually removed in its construction, the cost of said canal, the expenditures actually made on its construction, the lands irrigated thereunder, and that said canal had actually irrigated about 7,000 acres, the date of survey and of posting of notice, the date of beginning and completion of actual work of construction as above set forth, and that water was turned into said canal on the first day of May 1889, and 6,000 acres of crops were actually irrigated from said ditch during 1894, and that 7,000 acres of land would be irrigated during 1895.

VIII.

That thereafter and on the 15th day of June, 1896, the Secretary of said State Board of Irrigation mailed to this defendant at its postoffice address at Gering, Nebraska, notice that he would sit to hear proof based upon said claim affidavit No. 253, Division 1-A, at Gering Nebraska, on the 17th day of July 1896; that on said 17th day of July, 1896, this defendant caused proof to be made on the facts above set forth and in said statement of claim mentioned; that thereafter on the 13th day of January, 1897, the Secretary of said State Board of Irrigation rendered and filed an opinion under his docket No. 952 in the matter of said claim, whereby and wherein it was found and determined of and concerning the Winter's Creek canal of this defendant, that its course of appropriation was the North Platte River, that the object of its appropriation was the irrigation of lands, that the work of excavation and construction of said ditch began on the 15th day of November, 1888, that the priority of its appropriation dates from the 18th day of October, 1888, when notice of appropriation was posted at the proposed point of diversion and when the actual survey for construction was begun; that said ditch heads on the north bank of said stream in the quarter section hereinbefore set forth; that

said ditch was 12 miles long and passes through the lands above described; that it covers and reclaims the lands above described, amounting in all to about 8,700 acres. By said opinion said claim was allowed to the extent of 124 $\frac{2}{7}$ cubic feet of water per second of time; that thereafter, at a meeting of said State Board of Irrigation, at the office of its Secretary, Lincoln, Nebraska, on the 7th day of April 1897, said opinion and findings of its Secretary with reference to said docket No. 952 was on motion affirmed; that the same constitutes a valid adjudication of said appropriation of this defendant for that the proper affidavit of claim and pleading setting forth all the facts required by the practice in that behalf had been filed as aforesaid in advance of proof, and the proof offered were ample to sustain said adjudication.

IX.

This defendant and cross-petitioner further avers that on or about the 31st day of October, 1887, a corporation known as Farmers Canal Company was organized and incorporated under the laws of the State of Nebraska, and thenceforward until it ceased to do business as stated below continued to be such corporation; that in the spring of 1888, said Farmers Canal Company commenced
197 the construction of a canal to divert water from the North Platte river for irrigation purposes at a point therein in what was then Cheyenne County, now in Scotts Bluff County, Nebraska, where the west line of section 1, township 23, north range 58 west of the 6th P. M., intersects the north bank of said river; that said point is about 16 miles up the river from the headgate of said Winter's Creek canal of this defendant; that said Farmers Canal Company posted its notice of intention to construct a ditch beginning at said point of diversion on said river, on the 16th day of September, 1887, on which day a copy thereof was filed and recorded in the office of the County Clerk and Recorder of Cheyenne County, Nebraska, afterwards transcribed into the records of Scotts Bluff County, Nebraska; that certain work of excavation of said proposed canal was prosecuted from about the first day of March, 1888, until sometime in the year 1890, when said Farmers canal was partially constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said company ceased work thereon; that at said time there was not more than 1500 acres of land susceptible of irrigation from said Farmers Canal as then constructed and its capacity was not sufficient to conduct and distribute water for more than 1000 acres of land; that said company did not again resume work on said Farmers canal until the spring of 1892, at which time it undertook to further enlarge and extend the same and continued work thereon until some time in the summer of 1893, when it again ceased work of construction; that at the time said canal had been partially constructed for a distance of about 15 miles from its headgate, with capacity sufficient to irrigate not to exceed 2000 acres of land; that as completed in 1893 there were not more than 2000 acres of land susceptible of irrigation from said

canal; that prior to the year 1897 not more than 500 acres of land had actually been irrigated from said Farmers canal; that said

198 Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2000 acres of land; that thereafter, on or about the 23rd day of December, 1901, said canal of Farmers Canal Company, together with all its rights, property and franchises was sold under decree of foreclosure to one Robert Walker, who thereafter on or about the 20th day of October, 1904, sold and conveyed the same to defendant the Tri State Land Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey; that from the year 1893 until September, 1906, when defendant Tri-State Land Company began to enlarge and extend said Farmers canal, no work of construction had been done thereon; that prior to the commencement of this action said Tri-State Land Company entered into a contract with defendant Farmers Mutual Canal Company, a corporation organized under the laws of the State of Nebraska, whereby said Tri-State Land Company agreed to sell and said Farmers Mutual Canal Company agreed to buy the canal water rights, appropriations and franchises of said Tri-State Land Company, and plaintiff is informed and believes, and on such information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal, together with all water rights, appropriations and franchises justly acquired by it to defendant Farmers Mutual Canal Company, receiving in payment therefor, all of the capital stock of said last named defendant, a majority of which said capital stock said Tri-State Land Company still own and controls.

X.

This defendant and cross-petitioner further avers that on or about the 28th day of May, 1895, the County Clerk and Recorder of Scotts Bluff County, Nebraska made a transcript of said notice filed by said Farmers Canal Company on the 16th day of September, 1887, and transmitted the same to the office of the Secretary of the State Board of Irrigation of the State of Nebraska, where the same was
199 filed on the 31st day of May, 1895; that thereafter on the 5th day of June, 1896, the Secretary of said Board sent notice to said Farmers Canal Company that he would sit at Gering, in Scotts Bluff County, Nebraska, on Friday, July 17th, 1896, to hear proof of any claims for rights to use of water from North Platte river claimed prior to April 4, 1895, and that claimants are expected to attend at said hearing to furnish necessary proofs to sustain their claims; that thereafter on the 17th day of July, 1896, at said Gering, C. W. Ford, A. B. McCoskey and W. H. Wright appeared on behalf of the said Farmers Canal Company to offer proofs concerning the appropriations of said Farmers Canal; that at said time no claim affidavit or "Claim for the Waters of Nebraska" was filed or verified on behalf of said Farmers Canal Company or concerning any appropriations said to have been made or effected by said Farmers canal; that the only proof introduced or offered before

the Secretary of said Board at said hearing was the evidence of said three witnesses covering the following matters and no other, viz:

By C. D. FORD: That a notice of intention to construct said ditch was posted September 16, 1887, and on said date filed and recorded with the County Clerk and Recorder of Cheyenne County, Nebraska; that some construction work was done on said Farmers' canal in November, 1887; that the ditch was then built 12 feet on the bottom and for the first mile about 6 feet deep, calculated to run water 2 feet deep; that the ditch as at first constructed was ten miles long; that some water was diverted therefrom in 1888 and several places irrigated; that in 1890 perhaps 200 acres were irrigated, and that up to the time of said hearing possibly 500 acres; that additional notice of an intended appropriation was posed and filed on behalf of said Farmers Canal Company on the 17th day of November, 1890, and again on the 14th day of March, 1895; that there had been some enlargement of the original canal, concerning which said witness could not testify.

200 By A. B. McCosKEY: That he had worked with the engineering corps of said canal part of the time and to some extent was present during its enlargement; that at its head it was enlarged to be 100 feet wide, tapering down at station No. 50 or 5000 feet from headgate to 60 feet wide; that from that point it was constructed 30 feet wide, or one-half its surveyed width, for about 15 miles, being full width only the first mile; that said witness knew nothing about the amount of land irrigated up to the time of the hearing or how much land it was designed to water; that the headgate of said canal was constructed to leave 108 feet of clear water space in width; that such a headgate would cost about \$10,000.

By W. H. WRIGHT: That he was then President of Farmers Canal Company, acquainted with said canal since January, 1891; that said canal had been enlarged for the first half mile to 60 feet wide, for the next mile 30 feet wide, being one-half the size planned; that at said point it is intended to put in sandgates and from these sandgates to make it 45 feet wide; that below these sandgates it has been constructed for 17 miles one-half that width; that said ditch has been surveyed and cross-sectioned for 71 miles; that the preliminary survey ran ten miles further; that below the 19 miles where the ditch had been finished and for the next 15 miles the work had been opened for full width; that the work had been perhaps only one-half done for 19 miles down to Winter's Creek; that about \$100,000 had been expended; that it was designed to furnish water to 80,000 acres of land; that that acreage was under the proposed line when built to the end of the preliminary survey; that the chief land under the ditch cannot be covered with water until an approach is made to the lower end as surveyed; that at the time of his testimony work on the ditch had ceased for about 7 months; that negotiations were in progress whereby there were hopes to resume work.

That at and prior to the pretended adjudication of priorities for said Farmers Canal no other testimony was offered; that when said proof was offered, neither from any statement of claim on file or proof was this defendant nor any appropriator of water for irrigation purposes from the North Platte river notified or put on inquiry to suppose that an appropriation had been made and perfected by applicants of water to lands under and by means of said Farmers canal in excess of 500 acres requiring not more than 10 cubic feet of water per second; that not until the 19th day of September, 1896, and more than two months after said proof had been offered did said Farmers Canal Company or anybody in its behalf file in the office of the Secretary of the State Board of Irrigation any statement of claim or verified "Claim for the waters of the State of Nebraska;" that on the 15th day of September, 1896, William H. Wright, as president and on behalf of Farmers Canal Company, verified a so-called "Claim for the waters of the State of Nebraska" and filed the same in the office of the Secretary of the said State Board on the 19th day of September, 1896, where the same was endorsed as Claim No. 323, Division No. 1-A; that in and by so-called statement of claim it was stated that said Farmers canal for the first 19 miles of a proposed 81 miles in length had been completed one-half size; that 62 miles in length of said canal was uncompleted; that the total excavation intended would amount to 3,125,000 cubic yards of material and 150 feet of fluming; that the material actually removed was about 600,000 cubic yards and that no fluming had been completed; that the estimated cost of the canal was \$350,000, of which only \$98,000 had been expended.

In said so-called claim for the waters of the State of Nebraska the requirement under the rules and regulations of said State Board of Irrigation calling for a statement of date of completion of works and perfection of appropriation were left blank; that likewise there were left wholly blank the required statement concerning the date when water was turned into the ditch and number of acres of crops actually irrigated. That in said so-called claim for the waters of the State of Nebraska it was stated:

"13th. That the time stated as necessary to provide for the application of the amount of water herein claimed is five years from April 4th, 1895."

XII.

This defendant and cross-petitioner further avers that said do called claim for the waters of the State of Nebraska so filed after the introduction of the proofs aforesaid failed to show any perfected or completed appropriation of any water of the State of Nebraska from the North Platte river of elsewhere, and wholly failed to constitute any pleading or justification for any adjudication of a vested appropriation, and wholly failed to give any notice to any rival claimant of any pretended facts on which to base an adjudication for a vested and completed appropriation of water.

That on its face said pretended document amounts to nothing more than a claim for permit thereafter to appropriate water pursuant to provisions of the Act of 1895 in that behalf; that no copy of said pretended statement of claim was ever served upon or delivered to this defendant or to any adverse claimant or actual appropriator of water from said river; that the proof offered as aforesaid before the filing of said pretended claim to the waters of the State of Nebraska gave no notice to this defendant or to any other claimant that there was any pretense of an actual appropriation of water from the North Platte river into and by means of said Farmers Canal in excess of 10 cubic feet per second of time for the irrigation of about 500 203 acres of land along the upper portion of the line of said canal.

XIII.

That notwithstanding the premises, without any support from the testimony offered or any support from the pretended pleading filed, the Secretary of the Board of Irrigation of the State of Nebraska, on to-wit: the 7th day of January, 1897, at Lincoln Nebraska, assumed to file and render a so-called opinion under docket No. 918, based on said so-called claim No. 323, Division 1-A, on behalf of Farmers Canal Company, which said opinion (omitting long descriptions) is in words and figures as follows:

"The claim set forth in this record is for a right to the use of a portion of the water of the North Platte river for irrigation purposes, and is made by virtue of posting three notices of appropriation at the proposed point of diversion, No. 1 being posted on the 16th day of September, 1887, and filed for record in the office of the County Clerk of Cheyenne County, at Sidney, Nebraska, on the 19th day of September of the same year. No. 14 was posted on the 17th day of November, 1890, and filed for record the same day. No. 43 was posted on the 12th day of March, 1895, and filed for record in the office of the county clerk on the 14th day of March, 1895, and commencing the work of excavation and construction upon a proposed ditch or canal on or about the 1st day of March, 1888.

It appears from the record in the matter of this claim:

1st. That the name adopted for the ditch or canal is the "Farmers Canal."

2nd. That the source of the appropriation is the North Platte river.

3rd. That the object of the appropriation is the irrigation of lands.

204 4th. That the work of actual construction was begun on or about the 1st day of March, 1888.

5th. That the priority of the appropriation dates from the 16th day of September, 1887, when the first notice of appropriation was posted at the proposed point of diversion.

6th. (a) That the priority number of the appropriation for the water-shed is No. — Water Division No. 1-A. (b) That the priority number of the appropriation for the stream is No. — North Platte river.

7th. That the ditch or canal heads on the North bank of the

stream in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 3, T. 23 N. R. 58 West of the 6th P. M., near the West line of Sec. 10, T. 23, R. 58.

8th. That said ditch is about 81 miles in length and passes through the following described lands, viz: Beginning at a point on the North side of the North Platte river, near where the river intersects the West line of Sec. 10, in T. 23, R. 58, in Scotts Bluff County, Nebraska, on the N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of said section 10, thence through and over the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of said section 10 * * * (and describing about 140 other tracts).
* * *

9th. That said ditch or canal covers and reclaims the following described lands, viz: A part of Lot 1, T. 22, R. 58; parts of Lots 1 and 2, in Sec. 11, lots 1 and 2, and a part of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ Sec. 14 * * * (and further descriptions of land covering over three typewritten pages of legal cap), * * * amounting in all to about 80,000 acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the appropriation of water to the beneficial use indicated shall extend to December 1, 1904.

3rd. The amount of the appropriation shall not exceed eleven hundred and forty two and six-sevenths (1142-6/7) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and further, said appropriation under any circumstances, shall be limited to one-seventieth (1/70) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904."

That thereafter on, to-wit, the 7th day of April, 1897, at its meeting at Lincoln, Nebraska, without having previously given notice to this defendant or to any rival claimant or appropriator of water from said North Platte river said State Board of Irrigation pretended to affirm said opinion and pretended to cause the same to be designated as an adjudication of said Board.

XIV.

This defendant and cross-petitioner is advised by counsel and is informed and believes, and on such advice, information and belief avers the fact to be, that said so-called opinion of the Secretary of said Board of Irrigation and said so-called order of affirmance thereafter were wholly without jurisdiction void and of no effect whatever, and does not constitute an adjudication, for that it was not founded upon any proof, any pleading or any statement of claim, as by the practice, rules and regulations of said Board required to be filed as preliminary to any adjudication; further, that on its face the same purports to be a pretended permit for an extension of time

206 in which to perfect an appropriation to the amount of land, if any, which actually should be irrigated from said Farmers canal prior to the first day of September, 1904, and then only to the extent of one-seventieth of one cubic foot per second per acre of the land actually at that time irrigated from said canal.

XV.

That no copy of said pretended adjudication was ever recorded in the office of the County Clerk of Scotts Bluff county, Nebraska, at or for many years following said pretended adjudication and opinion. That this defendant and cross-petitioner had no notice of the rendition of said pretended opinion or the rendition of said pretended adjudication for more than ten years after the filing and record thereof in the office of said State Board of Irrigation.

XVI.

That for 11 years, to-wit, from the year 1897 to 1907, both inclusive, following the rendition of said pretended opinion and said pretended adjudication, this defendant and cross-petitioner under its adjudication claim of an appropriation of 124-2/7 cubic feet of water per second of time, constantly through each and every irrigating season diverted said quantity of water for the irrigation of upwards of 7,000 acres of land under its canal without any diversion into said Farmers canal under claim of senior priority or otherwise of water in excess of 28 cubic feet per second of time; that frequently and during each and every of said ten years had the owner or owners of said Farmers canal diverted more than 28 cubic feet of water per second of time; this defendant and cross-petitioner and the land owners constituting its stockholders and water consumers using water from its canal for irrigation purposes would have received much less water than in fact they did receive, for that said North Platte river during the months of July August and September of each and every year had so small a supply during said months that
207 with said small diversion into said Farmers canal, at times this defendant was unable to divert into its said canal as much water as the needs of crops under its line required.

That under said canal during said 11 years valuable crops requiring irrigation in the months of July August and September, particularly crops of corn, alfalfa, potatoes and sugar beets, have been raised, developed and harvested by means of water diverted into said canal of defendant under its said appropriation, which otherwise could not have been raised, developed or harvested.

That by virtue of the premises any pretended claims of appropriation of defendants Farmers Canal Company, Tri-State Land Company and Farmers Mutual Canal Company, if any, they or either of them ever had based on said pretended opinion of said Secretary of the State Board of Irrigation and of said pretended affirmance thereof, was wholly lost and is barred by the statute of limitations in that behalf and has thereby been wholly abandoned.

XVII.

The defendant and cross-petitioner further avers, that beginning in September, 1906, defendant Tri-State Land Company entered upon the work of very greatly enlarging and extending said Farmers canal and prosecuted said work from September, 1906, until the fall of 1907; that it enlarged said canal at the headgate and for some distance below to a width of 90 feet on the bottom and to a depth of 11 feet, and it extended the same in an easterly direction for about 40 miles from its headgate so as to make it capable of irrigation about 40,000 acres of land; and further, that defendants Tri-State Land Company and Farmers Mutual Canal Company threatened and intend to extend said canal for some 40 miles further with a view of ultimately irrigating thereunder as much as 80,000 acres of land. That notwithstanding the premises, said defendants

208 wrongfully claim upon the strength of said so-called and pretended opinion of the Secretary of the State Board of Irrigation and the pretended affirmance of said opinion by said Board hereinbefore set forth, and notwithstanding that for more than ten years after said pretended adjudication not more than 28 cubic feet of water per second of time had been diverted into said Farmers Canal, the right now and hereafter to divert into said canal many hundreds of cubic feet of water per second of time in excess of said 28 cubic feet and ultimately to divert as much as 1142 second-feet into said canal for irrigation of lands which prior to the year 1908 had been wholly arid, and in so doing claim the right to make such diversion as senior, prior and paramount to the appropriation of this defendant above set forth. That during the years 1909 and 1910 said defendants have diverted into said canal many hundreds of cubic feet of water per second of time in excess of the 28 second feet which was the maximum diversion prior to the year 1908, and thereby have wrongfully deprived this defendant of water to which it is justly entitled, and thereby greatly injured growing crops of stockholders of this defendant on lands under the line of the Winter's Creek canal; that unless restrained and enjoined by this Honorable Court said wrongful claim will hereafter be asserted and increased up to a total diversion of 1142 cubic feet of water per second of time into said Farmers canal, which heads in said river above the canal of this defendant; that unless restrained and enjoined by this Honorable Court said wrongful claims of said defendants will be recognized by the State Board of Irrigation of the State of Nebraska under color of said pretended opinion and said pretended adjudication; that without relief in this court, sitting as a court of equity, this defendant and cross-petitioner and all its stockholders and land owners under its line of canal will suffer great and irreparable injury, and lands

209 heretofore devoted to the raising of valuable crops of sugar beets, potatoes, corn and alfalfa, requiring irrigation in the months of July, August and September, will no longer yield revenue except for less remunerative crops which can be irrigated only in the early part of each irrigation season. That the supply of water in the North Platte river during said months of July, August and September is frequently very low and at times not sufficient fully

to supply this defendant with its 125-2/7 cubic feet of water per second of time when needed for irrigation of lands under its line, with due regard to the senior rights of defendant the Minatare Mutual Canal and Irrigating Company and conceded senior right of defendant Tri-State Land Company and Farmers Mutual Canal Company to divert 28 cubic feet of water per second of time as senior to this defendant's appropriation; that for said defendants Tri-State Land Company and Farmers Mutual Canal Company to be permitted to divert more than 28 cubic feet of water per second of time during such times of scarcity will to the exact extent of said increase deprive this defendant and its consumers of water in that amount.

XVIII.

That by virtue of the premises this defendant and cross-petitioner is without remedy in the premises save in a court of equity where such matters are properly cognizable; that neither the plaintiff nor any defendant herein has any priority or appropriation of water from the North Platte river senior to that of this defendant Minatare Mutual Ditch Company to the extent of the amount of water it may justly show herein it has acquired under priority senior to that of this defendant, and defendants Tri-State Land Company and Farmers Mutual Canal Company to the extent of not less than ten or more than twenty-eight cubic feet of water per second of time, and no other:

Wherefore this defendant and cross-petitioner respectfully prays that at final hearing of this cause it be ordered, adjudged and decreed by this court.

210 1st. That defendants Farmers Canal Company, Tri-State Land Company and Farmers Mutual Canal Company do not have a priority senior to that of this defendant from the North Platte river in excess of 28 cubic feet of water per second of time.

2nd. That defendant the Minatare Mutual Ditch Company has an appropriation for irrigation purposes from said North Platte river to the extent of such quantity of water as by its pleadings and proof it may justly show it is entitled to senior to the priority of this defendant and cross-petitioner.

3rd. That save for said senior priority of said defendant the Minatare Mutual Ditch Company and a senior priority of defendants Tri-State Land Company and Farmers Mutual Canal Company not to exceed 28 cubic feet of water per second of time, this defendant and cross-petitioner is the first and senior appropriator of water from the North Platte river as against plaintiff and all other persons herein to the extent of 124-2/7 cubic feet of water per second of time.

4th. That plaintiff and all defendants herein other than this cross-petitioner be enjoined and restrained and commanded by this court absolutely to refrain and desist at times of scarcity in said North Platte river during irrigating seasons or when the supply is inadequate otherwise to supply this defendant for use of its consumers with said 124-2/7 cubic feet of water per second of time, after sup-

plying defendant the Minatare Mutual Ditch Company with its senior priority and defendants Tri-State-Land Company and Farmers Mutual Canal Company with not to exceed 28 cubic feet of water per second of time, from diverting any water whereby this defendant will be deprived of any part of its said appropriation.

5th. For such further, different and other relief as to this court, sitting as a court of equity, may seem meet, suitable and proper in the premises. And as in duty bound this defendant and cross-petitioner will ever pray.

211

WINTER'S CREEK IRRIGATION
COMPANY,

By F. F. EVERETT, *Vice President.*

H. N. HAYNES,

Attorney for said Defendant.

STATE OF NEBRASKA,

County of Scotts Bluff, ss:

F. F. Everett, on oath says: That he is the Vice-President of Winter's Creek Irrigation Company; that he has read the above and foregoing answer and cross-petition, and that the facts therein stated are true as he verily believes.

F. F. EVERETT.

Subscribed in my presence and sworn to before me this 6th day of December, 1910.

My Notarial Commission expires July 22, 1916.

S. STARK,

Notary Public.

And afterwards on the 9th day of December 1910 there was filed in the office of the Clerk of the District Court of Scotts Bluff County, Nebraska, an answer and amended and supplemental cross-petition of the Chimney Rock Irrigation Canal and Water Power Company, in the words and figures following to-wit:

212 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

VS.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigation Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Copartnership under the Firm Name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemental Cross-petition.

Comes now the above named defendant, The Chimney Rock Irrigation Canal and Water Power Company, and for answer to the amended and supplemental petition of the plaintiff herein alleges:

First. This defendant admits the allegations contained in paragraphs one to nine inclusive, eleven to twenty-one inclusive, twenty-three to twenty-six inclusive and twenty-eight of said amended and supplemental petition, and all other allegations in said amended and supplemental petition contained that are hereafter affirmatively set out in the cross-petition of this defendant; this defendant denies each and every other allegation in said amended and supplemental petition contained, except such allegations as are hereinafter admitted or qualified.

Amended and Supplemental Cross-petition.

For its amended and supplemental cross-petition against the plaintiff and the other defendants to this action, this defendant, for and on behalf of itself and the users of water from its canal hereinafter described, alleges:

213 First. That at all times hereinafter mentioned The Chimney Rock Irrigation Canal and Water Power Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Nebraska.

Second. That on or about the 3rd day of December 1890, this cross-petitioner, The Chimney Rock Irrigation Canal and Water Power Company, posted a notice on the south bank of the North Platte River near the east quarter corner of Section 1, Township 20 north, Range 53 west of the 6th P. M., in Scotts Bluff County, Nebraska, of its intention to divert and appropriate a sufficient supply of water from said river at said point to irrigate 23,040 acres

of land, said water to be conducted through a canal diverging from said river at said point and continuing in a southeastly direction through said Section 1, and also through Sections 6, 7, 8, 9, 16, 15, 14, 17, 21, 26, and 25, Township 20 north, Range 52 west and Sections 19, 20, and 30 of Township 20, Range 51 west; and on or about the 10th day of December 1890, said notice was filed for record in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and also in the office of the County Clerk and Recorder of Cheyenne County, Nebraska.

Third. That prior to the posting of said notice said company commenced the construction of its said canal and prosecuted the same diligently and uninterruptedly to completion. That said canal was completed prior to the irrigation season of 1897. That when completed said canal was 32 feet wide on the bottom for a distance of about one mile from the headgate. That said canal consists of two branches from a point about one mile from the headgate. That the south branch of said ditch was 16 feet wide on the bottom for a distance of about three miles from the point said ditch is gradually narrowed to the end thereof at which place it is 8 feet wide. That

the north branch of said ditch was 14 feet wide on the bottom
 214 from the point of divergence from the south branch for a distance of about one mile, from which point said ditch diminished in size to the end thereof where it was about 8 feet in width. That the south branch of said ditch passes through Sections 7, 17, 18, 21, 22, 26, 25, and a portion of Section 24 in Township 20, Range 52 west and Sections 30 and 19 in Range 51 west. That the north branch of said ditch passes through Sections 7, 8, 9, 16, 15, and 14 of Township 20 north, Range 52 west. That the carrying capacity of said ditch is more than 60 cubic feet per second of time and is more than sufficient to carry a sufficient supply of water for the irrigation of all the lands hereinafter mentioned.

Fourth. That in June 1891, water was conducted through said canal from the North Platte River to a portion of the land subject to irrigation therefrom, said land being the place of intended use of said water. That about 500 acres were irrigated from said canal during said year, and during each and every year thereafter the amount of water conducted through said canal and the amount of land irrigated therefrom, had been increased until the year 1899, when all the land subject to irrigation therefrom had been irrigated and reclaimed and all of said lands have been irrigated from said canal during each and every year subsequent to the year 1899. Said lands are described as follows:

All that part of the following described lands which lie between said ditch and the North Platte River, to-wit:

The south half of Section 6, the east half of Section 7, Section 8, the north half of Section 17, Section 9, Section 16, the north half of Section 21, the south half of Section 10, Section 15, Section 22, Section 14, Section 23, the north half of the north half of Section 26, the south half of Section 13, Section 24, the north half of Section 25, Township 20 north, Range 52 west, the north half of Sec-

tion 30, and Section 19, Township 20 north, Range 51 west of the 6th P. M., containing about 6,750 acres.

215 Fifth. That by virtue of the performance of the acts above enumerated The Chimney Rock Irrigation Canal and Water Power Company has acquired and is now the owner of the right to divert and appropriate from the North Platte River a sufficient quantity of water for the irrigation of the above described lands, to-wit 60 cubic feet of water per second of time continually flowing during each and every irrigation season, with a priority dating from the 3rd day of December 1890.

Sixth. This cross-petitioner further avers that on or about the 15th day of May 1895, a transcript of the above mentioned notice, duly certified by the County Clerk of Scotts Bluff county, Nebraska, was filed in the office of the Secretary of the State Board of Irrigation of said state; that thereafter this cross-petitioner filed its claim for the use of the water appropriated by it in the office of the Secretary of the State Board of Irrigation; that on or about the 14th day of July 1896, the Secretary of the State Board of Irrigation made certain inquiry and took certain evidence regarding the claim of this cross-petitioner and on the 13th day of September 1898, the said Secretary of said Board, rendered an opinion with reference to said claim and made the same a matter of record in his office, in which opinion the said Secretary found and determined that this cross-petitioner had constructed a ditch or canal as stated in this cross-petition; that said ditch or canal covers and reclaims the lands herein described; and that the priority of the appropriation of this cross-petitioner dated from the 3rd day of December 1890, when the notice of appropriation was posted at the proposed point of diversion.

Seventh. This cross-petitioner further avers that a copy of said opinion of the Secretary of the State Board of Irrigation was forwarded to and received by this cross-petitioner; that said opinion contained no finding whatever regarding any other appropriation or claim for the use of water from said stream, nor did said opinion determine or find that any other person, company, corporation or party was entitled to appropriate any water from said stream prior or subsequent to said The Chimney Rock Irrigation Canal and Water Power Company, nor did said opinion contain any finding whatever as to the relative priorities of the various appropriators of water from said stream; that said opinion was substantially correct as to the appropriation acquired by this cross-petitioner and in view of the fact that it did not purport to give any other person, company, corporation or party a right to the use of any of the water of said stream prior to that of this cross-petitioner, it was satisfactory in all respects to the cross-petitioner herein.

216 Eighth. This cross-petitioner further avers that on or about the 2nd day of January, 1899, the State Board of Irrigation of the State of Nebraska, caused a resolution to be entered on its records affirming said opinion of the Secretary of said Board on the claim of this cross-petitioner, but this cross-petitioner had no notice whatever of the entry of said resolution, or the contents thereof and never re-

ceived any notice, knowledge or information with reference thereto until shortly prior to the commencement of this suit.

Ninth. That during each and every month of each and every irrigation season there has been a sufficient quantity of water flowing down the channel of said river to the headgate of the canal of this defendant to supply a sufficient quantity of water to be diverted into said canal to irrigate all of said lands above described; that prior to the time said lands were irrigated, they were, on account of insufficient moisture and rain-fall, desert in character and incapable of producing crops, but since irrigating the same they have become very productive and valuable, and have been brought to a

217 high state of cultivation. That since the application of water to said lands through and by means of said canal they have been used in raising various kinds of vegetables, grains, hay and other crops adapted to the climatic conditions of the country. That some of said lands have been planted to alfalfa and some to shrubbery and trees, which are all in good flourishing condition, owing to the fact that they have been irrigated, and it is absolutely necessary to continue to irrigate the same during the various months of each irrigation season in order to preserve said crops, trees and shrubbery from ruin and destruction; that without irrigation said lands would become practically valueless and the prosperous homes now located thereon would be destroyed and ruined.

Tenth. This cross-petitioner further avers that on or about the 31st day of August 1887, a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the state of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of the State of Nebraska. That in the Spring of 1888, said The Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte river at a point on said river in Scotts Bluff County, Nebraska, where the west line of Section 10, Township 23, north, range 58 west, intersects the north bank thereof, for irrigation purposes. That said point of diversion of the canal of The Farmers Canal Company is about 40 miles up the river from the headgate of the canal of this cross-petitioner. That said The Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said Company ceased work thereon. That at said time there was not more than 1500 acres of land susceptible to irrigation from said canal as then constructed,

218 and the capacity of said canal was not sufficient to carry water for more than 1000 or 1200 acres of land. That said company did not again resume work on said canal until the Spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the Summer of 1893, when it again ceased work, on said canal. That when said Company ceased work on said canal in 1893, it had constructed the same for a distance of about 15 miles from the headgate thereof with a capacity sufficient to irrigate about 2500 or 3000 acres of land.

That as completed in 1893, there were not more than 2000 acres of land susceptible of irrigation from said canal and said company and its grantees never irrigated more than 2000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than said 2000 acres of land. That on or about the 23rd day of December 1901, said canal of The Farmers Canal Company, together with all its property, rights, and franchises, was sold under a decree of foreclosure to one Roberts Walker, who, on or about the 20th day of October 1904, sold and conveyed the same to The Tri State Land Company, one of the defendants above named, which is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

Eleventh. That no further work was done on said canal from the time that The Farmers Canal Company ceased work thereon in the year 1893 until the defendant, The Tri-State Land Company commenced to enlarge and extend the same in September 1906. That said defendant, The Tri-State Land Company prosecuted work thereon from September 1906 until the Fall of 1907, and did enlarge said canal at the headgate and for some distance below the headgate to a width of 90 feet at the bottom and a depth of 11 feet, and did extend the same in an easterly direction for a distance of about 40 miles from the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land.

219 That prior to the commencement of this action said Tri-State Land Company entered into a contract with The Farmers Mutual Canal Company, a corporation organized under the laws of the State of Nebraska, whereby said Tri-State Land Company agreed to sell and said Farmers Mutual Canal Company agreed to buy the canal, water-rights, appropriations and franchises of said The Tri-State Land Company, and plaintiff is informed and believes and on such information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal together with all water rights, appropriations and franchises acquired by it to said The Farmers Mutual Canal Company receiving in payment therefor all of the capital stock of The Farmers Mutual Canal Company a majority of which said capital stock said Tri-State Land Company still owns and controls. That the Tri-State Land Company and said Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 or 40 miles so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said Companies intend to divert and appropriate water through said canal from the North Platte River which is the only source of supply of the canal of the said cross-petitioner herein.

Twelfth. This cross-petitioner further avers on information and belief that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of The Farmers Canal Company to appropriate water from the North Platte River; that thereafter and on or about the 19th day of September 1896,

said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska, its claim for an appropriation of water from the North Platte River to the extent of 275,000 minors' inches for the irrigation of certain
220 lands in said claim described, amounting to 70,000 acres; that thereafter and on or about the 9th day of January, 1897, the Secretary of the State Board of Irrigation did render an opinion on said claim and made the same a matter of record in his office, in which opinion he, the said Secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte River in the southwest quarter of the southeast quarter of section three, township twenty-three north, range fifty-eight west; that said ditch or canal is about eighty-one miles in length; that said ditch or canal covers and reclaims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dates from the 16th day of September 1887. Said Opinion further states that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd. The amount of the appropriation shall not exceed eleven hundred and forty-two and six-sevenths (1142-6/7) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth (1/70) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

But said opinion contained no finding whatever as to the relative priorities of the various appropriators of water from said stream.

221 Thirteenth. This cross-petitioner further avers on information and belief that several other claimants for the use of water from the North Platte River had, prior to the 7th day of April, 1897, filed with the Secretary of the State Board of Irrigation of the State of Nebraska, their respective claims for the use of water from the North Platte River; that the State Board of Irrigation after making such ex parte inquiry and taking such evidence ex parte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims; that no claimant for water from said river had any notice whatever of the claims for water filed by others, nor had any claimant, for water from said river; any notice of the opinions of the Secretary of the State Board of Irrigation on the other claims for water from said river; that on the 7th day of April, 1897, the State Board of Irrigation, without any notice to the claimants of appropriations of water from said river or any of them, and without the knowledge of this cross-petitioner or

its grantor, caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of said Board prior to that date, including the opinion rendered on the claim of The Farmers' Mutual Canal Company.

Fourteenth. This cross-petitioner further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the said State Board of Irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty miles in length; that the claim filed by the said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land, nor any part thereof, except about two thousand acres; that at said
222 time said company had not acquired a right to appropriate 1132-6/7 cubic feet of water per second of time from said river nor any part thereof, except about twenty-eight cubic feet of water per second of time; and said opinion and said resolution are erroneous and false in said particulars.

Fifteenth. This cross-petitioner further avers that it had no notice whatever of the filing of said claim of The Farmers Canal Company or any hearing thereon, or inquiry with reference thereto, of the resolution entered upon the records of said Board affirming said opinion, nor did this cross-petitioner acquire any knowledge whatever of the above mentioned transactions of said Board and its Secretary for several years after they had taken place; that no copy of said opinion and resolution, or either of them, was ever at any time delivered to this cross-petitioner or filed in the office of the County Clerk of Scotts Bluff County, Nebraska, or of any other county in the state of Nebraska, nor was any certificate signed by the President of said Board and attested by the Secretary, or otherwise, of the priority or amount of the appropriation of The Farmers Canal Company or any other information with reference to the claim of said company ever transmitted to the County Clerk of Scotts Bluff County or Cheyenne County, Nebraska, or to the clerk of any other county in said state nor was any such certificate with reference to the appropriation of this cross-petitioner ever transmitted to the County Clerk of Scotts Bluff or Cheyenne County, Nebraska, or any other county; that the opinion rendered by the Secretary of the State Board of Irrigation on the claim of this cross-petitioner, which was the only action on the part of said Secretary of said Board of which this cross-petitioner had any notice, did not show that any prior appropriations had been allowed but on the contrary showed on its face that no prior appropriations had been allowed from said river; that this cross-petitioner was given no opportunity whatever of a appearing before the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference thereto and said opinion on the claim of The Farmers Canal Company and
223 the resolution above referred to attempting to affirm the same are therefore null and void as to this cross-petitioner.

Sixteenth. This cross-petitioner further avers that neither

the Farmers Canal Company nor its grantees, nor either of them, ever appropriated or applied to a beneficial use, prior to the year 1909, more than twenty-eight cubic feet of water per second of time, yet notwithstanding this fact, The Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired through and under the Farmers Canal Company, a right to appropriate from the North Platte River 1142-6/7 cubic feet of water per second of time with a priority dating from the 16th day of September, 1887, and said Companies have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte River to the extent of 1142-6/7 cubic feet per second of time, continuously flowing during the irrigation season of each and every year which is prior to the right of appropriation acquired by this cross-petitioner and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the canal of this cross-petitioner for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river, and will do so unless restrained by an order or decree of this Court.

Seventeenth. This cross-petitioner further avers that during the greater portion of the irrigation season of 1910, said The Tri-State Land Company and The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time, and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of this cross-petitioner much below the quantity of water to which this cross-petitioner was entitled to divert from said river; that notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made

224 prior to the passage of the law creating said Board and notwithstanding the fact that no adjudication was in fact made by said Board of the relative rights of this cross-petitioner and the other parties to this action, yet because of the rendering of the opinion above mentioned by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation refused to limit or restrict said Farmers Mutual Canal Company and Tri-State Land Company or either of them, in the diversion of water from said stream to twenty-eight cubic feet of water per second of time, or to any quantity less than 1142-6/7 cubic feet per second of time, but on the contrary said State Board of Irrigation caused the headgate of the canal of this cross-petitioner to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed The Farmers Mutual Canal Company and the Tri-State Land Company to divert as much water from said river as they desired to the extent of 1142-6/7 cubic feet of water per second of time; that during all of the time that the headgate of the canal — this cross-petitioner was closed by the State Board of Irrigation as aforesaid, said Farmers Mutual Canal Company and Tri-State Land Company were diverting several hundred cubic feet of water per second of time from said river, which included

60 cubic feet of water per second of time which this cross-petitioner was entitled to have flow into and through its said canal for the irrigation of land subject to irrigation therefrom.

Eighteenth. This cross-petitioner further avers that to give the Farmers Mutual Canal Company or its grantors a priority over the cross-petitioner to the use of water to the extent of 1142-6/7 cubic feet of water per second of time would be to deprive this cross-petitioner and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution

225 above referred to constitute a cloud on this cross-petitioner's title to an appropriation of water from said stream and unless said cloud is cleared by a decree of this Court, The State Board of Irrigation will continue in the future as it has in the past to refuse to grant this cross-petitioner or the consumers of water under its canal any relief whatever against the unlawful diversion of the water of said stream by The Farmers Mutual Canal Company and the Tri-State Land Company, and will permit said companies to divert all of the water of said stream during times of scarcity to the entire exclusion of this cross-petitioner and the users of water from its said canal.

Nineteenth. That the average flow of water in said river at or near the headgate of the canal of this cross-petitioner and that of the defendants The Farmers Mutual Canal Company and the Tri-State Land Company during part of July and during all of the months of August, September, October and November, has been for several years last past, and will be in the future much less than the amount of water which said defendants The Farmers Mutual Canal Company and the Tri-State Land Company claim a right to divert and appropriate prior to the right of this cross-petitioner and if said companies be permitted to divert 1,142 6/7 cubic feet of water per second of time prior to the cross-petitioner herein the said cross-petitioner and the users of water from its said canal will be deprived of the use of water for irrigation purposes during the latter part of the month of July and during the months of August, September, October and November of each and every year, to the irreparable damage and injury of said cross-petitioner and the users of water from its canal.

Twentieth. This cross-petitioner further avers that the claim of the Farmers Mutual Canal Company and The Tri-State Land Company to the right to appropriate 1,142 6/7 cubic feet of water per second of time from the North Platte River during each and every irrigation season is unfounded in truth and in fact; that

226 neither The Farmers Mutual Canal Company, The Tri-State Land Company, nor its grantors, nor either of them, ever acquired a right to appropriate from said river any amount of water whatever except a sufficient amount to irrigate about 2,000 acres of land, or 28 cubic feet of water per second of time, continuously flowing during each and every irrigation season. That all rights of appropriation acquired by said companies and their grantors to appropriate water from the North Platte River, if any rights were acquired by said Companies, or either of them, are subsequent, junior

and inferior to the right of appropriation of water from said river acquired by this cross-petitioner. That if said The Tri-State Land Company or The Farmers Mutual Canal Company ever did, by virtue of any proceedings taken by said company or its grantors, or either of them, or otherwise initiate a right of appropriation which, upon application to a beneficial use, would ripen into a right to appropriate water from said river, said rights so initiated, if any, have become lost to said The Farmers Mutual Canal Company and its grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged right, if any right was in any manner ever initiated or acquired by said companies or its grantors.

Twenty-first. This cross-petitioner further avers that in order to determine how much water the defendants The Tri-State Land Company, The Farmers Mutual Canal Company, The Mitchell Irrigation District, and The Gering Irrigation District, should permit to flow down the channel of said river to the headgate of the canal of this cross-petitioner, it will be necessary to determine the quantity of water, if any, that this cross-petitioner may be compelled to permit to flow down the channel of said river to the headgates of the canals of the other defendants herein and to judicially determine the relative rights of priority of all of the parties to this action.

227 Wherefore this cross-petitioner prays:

1. That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired a right to appropriate from said rivers and the relative priorities of said rights of appropriation.

2. That it be adjudged and decreed that this cross-petitioner has acquired a right of appropriation of water from the North Platte River to the extent of 60 cubic feet per second of time continuously flowing during each and every irrigation season with a priority dating from the 3rd day of December 1890, and that said right is prior in right and prior in time to that of the Tri-State Land Company and the other parties to this action and each of them, and that the title to said right of appropriation of this cross-petitioner be quieted and confirmed in this cross-petitioner as against the other parties to this action and each of them. That the defendants The Tri-State Land Company and all of the other parties to this action taking water from said river above the headgate of this cross-petitioner, and each of them, be enjoined and restrained from decreasing or diminishing the flow of water in said river at the headgate of the canal of the cross-petitioner herein, below the amount of water which said cross-petitioner has acquired a right to appropriate, to-wit 60 cubic feet per second of time continuously flowing during each and every irrigation season, and the amount of water, if any, which it may be adjudged and decreed that this cross-petitioner shall permit to flow down the channel of said river past its headgate, and that the cloud cast on cross-petitioner's title by reason of the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board confirming said opinion be removed.

3. That this cross-petitioner be granted such other and further relief as may be just and equitable.
- 228 4. That this cross-petitioner have and recover judgement for costs of this action.

THE CHIMNEY ROCK IRRIGATION CANAL
AND WATER POWER COMPANY,

By — — —, *Its Attorney.*

STATE OF NEBRASKA,

County of Scotts Bluff, ss:

R. F. Durnal being duly sworn deposes and says that he is the President of the Chimney Rock Irrigation Canal and Water Power Company, the Cross-petitioner above named; that he has read the foregoing answer and cross-petition, and knows the contents thereof; that the facts therein stated are true as he verily believes.

R. F. DURNAL.

Subscribed in my presence and sworn to before me this Sixteenth day of November A. D. 1910.

My commission expires Feb. 19th, 1915.

[SEAL.]

JAMES BURNES,
Notary Public.

And afterwards on the 30th day of January 1911 there was filed in the office of the Clerk of the District Court of Scotts Bluff County, Nebraska, plaintiff's reply to the answer of the Tri State Land Company in the words and figures following, to-wit:

229 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

VS.

THE TRI-STATE LAND COMPANY et al., Defendants.

Plaintiff's Reply to the Answer of Defendant Tri-State Land Company.

Comes now the above named plaintiff and for reply to the allegations contained in the answer of the defendant, Tri-State Land Company, alleges:

Plaintiff admits that on June 5th, 1896, a notice was issued by the Secretary of the State Board of Irrigation, but denies that said notice was issued after all said claims had been filed, and denies that said notice stated that the rights of the claimants would be determined on the 17 day of July, 1896, and denies that said notice specified any time whatsoever on which the rights of the claimants would be determined.

Plaintiff further avers that said notice was in words and figures following, to-wit:

Office of the State Board of Irrigation.

LINCOLN, NEBR., June 5, 1896.

Notice.

Notice is hereby given that the hearing in the matter of adjudicating rights to the use of water claimed prior to April 4th, 1895, within the water shed of the North Platte and Platte Rivers, will be held for the several counties therein, by an officer of the State Board of Irrigation at the places and upon the dates indicated as follows:

For Dawson, Buffalo, Kearney, and Phelps Counties, at Lexington, on Tuesday, July 7th, 1896, at the Court House:

For Lincoln County, in North Platte, on July 8th, 1896, Court House:

230 For Keith County, in Ogallala, on Friday, July 10th, 1896, Court House:

For Deuel County, in Chappel, on Saturday, July 11th, 1896, Court House:

For Cheyenne and Banner Counties, in Bayard, on Tuesday and Wednesday, July 14 and 15, 1896:

For Scotts Bluff and Sioux Counties, in Gering, on Friday, July 17, 1896, at office of O. W. Gardner.

Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing the necessary proofs, if any be required, to sustain their claims; otherwise said claims will be dismissed.

STATE BOARD OF IRRIGATION.

W. R. AKERS,

State Engineer, Secretary."

Plaintiff further avers that the foregoing notice above set out was the only notice of any kind or description ever forwarded by the State Board of Irrigation, or its Secretary, or any officer, agent or clerk thereof, to any of the parties to this action.

Plaintiff admits that on the 14th and 15th days of July 1896, the Honorable W. R. Akers, Secretary of the State Board of Irrigation, remained in Bayard, Nebraska, for the purpose of making inquiries and taking evidence regarding the claims for the use of water of the State of Nebraska; that on the 14th day of July 1896, said W. R. Akers, Secretary of the State Board of Irrigation heard certain evidence with reference to the respective claims of the following parties, to-wit: The Chimney Rock Irrigation Canal and Water Power Company, The Nine Mile Canal and Reservoir Company, The Alliance Irrigation Canal & Water Power Company and Charles E.

231 Logan; that on said day the claim of The Belmont Irrigation Canal & Water Power Company was submitted to said Secretary of said Board on the record without the introduction or submission of any evidence that said Secretary of said Board remained in Gering, Nebraska, on July 17th, 1896, for the purpose of hearing evidence with reference to claims for the use of water; that on said

day said Secretary of said Board did make certain inquiries and take certain evidence with reference to the claims of appropriations of the following named parties, to-wit: Yorick Nichols and Carrol Nichols, The Winters Creek Irrigation Company, The Enterprise Ditch Company, The Castle Rock Irrigation Canal & Water Power Company, The Central Irrigation Canal and Water Power Company, The Minatare Mutual Canal & Irrigating Company; that at said time no claim of appropriation was filed with the State Board of Irrigation by The Farmers' Mutual Canal Company, but said company submitted evidence before the Secretary of said Board relative to its canal, showing that it had completed said canal to the full size intended for a distance of one mile below the head-gate thereof and no farther; that it had excavated said canal one half of its intended size for a distance of eighteen miles below said completed mile and no farther; that below and beyond said nineteen miles a few small detached portions had been excavated, and that the total excavation performed did not exceed one-fifth of the excavation required to complete said canal to the full size intended; that at and prior to said time not more than 500 acres of land had ever been irrigated through or by means of said canal.

Plaintiff further avers that all of the evidence taken by the Secretary of said Board on the respective claims above mentioned was reduced to writing and made a matter of record in the office of the Secretary of the State Board of Irrigation.

Plaintiff denies that the claims of said parties above mentioned, or either of them, were adjudicated by the Secretary of the State Board of Irrigation, or by the State Board of Irrigation, or by any other authority, on the day or days on which said inquiries were made and said evidence taken, and denies that any adjudication whatsoever with reference to said claims, or either of them, was made under or pursuant to the notice of June 5th, 1896, or under or pursuant to any other notice, or at all.

Plaintiff admits that the Secretary of the State Board of Irrigation rendered an opinion on each of the above mentioned claims, but denies that all of said opinions were rendered at the same time, but on the contrary alleges that said opinions were rendered at different times and on different dates; that on the 7th day of January 1897, the Secretary of said Board rendered a separate opinion on the respective claims of each of the following named parties: The Farmers Canal Company, The Enterprise Ditch Company, The Minatare Canal & Irrigating Company, The Castle Rock Irrigation Canal & Water Power Company; that on the 8th day of January 1897, said Secretary of said Board rendered an opinion on the claim of The Nine Mile Canal & Reservoir Company; that on the 13th day of January 1897, said Secretary rendered an opinion on the claim of The Winter's Creek Irrigation Company; that on the 26th day of January, 1897 said Secretary of said Board rendered an opinion on the claim of Yorick Nichols and Carrol Nichols, the grantors of The Ramshorn Ditch Company; that on the 28th day of January 1897, said Secretary of said Board rendered an opinion on the claim of The Browns Creek Irrigation Company; that on the 7th day of April 1897, the State Board of Irrigation adopted a resolution affirming

the various opinions of the Secretary above mentioned; that on the 10th day of August 1898, the Secretary of said Board rendered an opinion on the claim of The Belmont Irrigation Canal & Water Power Company; that on the 12th day of August 1898, the Secretary of said Board rendered an opinion on the claim of The Alliance Irrigation Canal & Water Power Company; that on the 233 13th day of September 1898, said Secretary of said Board rendered an opinion on the claim of The Chimney Rock Irrigation Canal & Water Power Company; that on the 2nd day of January 1899, the State Board of Irrigation adopted a resolution affirming the last three opinions above mentioned.

Plaintiff further avers that no notice whatever was given or sent out by the State Board of Irrigation, or its Secretary or by any officer or member thereof, of the rendition of said opinions above mentioned, or either of them or of the adoption of the resolutions above mentioned, or either of them.

Plaintiff further avers that to give said opinions, or either of them, the effect of a judgment, decree or binding adjudication, whereby the Tri-State Land Company and its successors or either of them, is or shall be awarded an appropriation from said river to the extent of 1142-6/7 cubic feet per second of time senior to that of the plaintiff and those of the other users of water from said river, would deprive the plaintiff and the other users of water from said river of their property without due process of law and would deprive them of the equal protection of the law, in violation of Section 1 of Art. V and section 1 of Art. XIV of the Amendments of the Constitution of the United States.

Plaintiff admits the posting of the notice by The Farmers' Canal Company, the commencement of work by said company on its canal in March 1888, and the continuation thereof until some time in the year 1890, when said Company ceased work thereon; admits that said Company again resumed work in the spring of 1892 and continued work thereon until November 1st, 1893, when it again ceased work thereon; admits that it erected a substantial head-gate and expended in the erection of said head-gate and construction of said canal something less than \$100,000; that said canal was excavated the full width for about the distance of one mile from the head-

gate and for a distance of about eighteen miles farther it was 234 about one-half the size intended at said time; that in addition thereto it excavated detached portions of said canal below the end of the completed canal, but denies that said detached portions were excavated for a distance of twenty-five miles or for any distance in excess of fifteen miles; admits that in order to procure funds for the carrying on of its enterprise, said The Farmers Canal Company issued its bonds and gave a mortgage to secure the same on its canal ditch, water-rights, franchises and other property; that said mortgage was foreclosed and the property, water rights, privileges and franchises of said Company conveyed to one Roberts Walker, under a decree of foreclosure.

Plaintiff admits that on or about the 14th day of April 1902, one William Frank filed in the office of the Secretary of the State Board

of Irrigation his application for twenty-two hundred cubic feet of water per second of time from the North Platte river, for irrigating and other beneficial purposes, proposing to construct a canal one hundred and fifty miles long and to irrigate one hundred and fifty acres of land, the point of diversion of the water and the line of the proposed canal being substantially that of the Farmers Canal Company; that protests were filed by the Farmers Canal Company and Roberts Walker against the granting of the permit of said William Frank; that after hearing on said protests, an order was entered by the State Board of Irrigation denying the application of said William Frank for a permit to appropriate water for the irrigation of any of the lands covered by the eighty miles of the proposed extension of The Farmers Canal, from which order an appeal was taken, and the cause ultimately reached the Supreme Court of the State of Nebraska, but plaintiff denies that any rights whatever claimed by said The Farmers Canal Company and by Roberts Walker, or either of them, were confirmed in said action by the Supreme Court or otherwise.

235 Plaintiff further avers that neither of the parties to this action were parties to said above mentioned proceeding, and that neither the plaintiff nor any of the other parties to this action, except the successors of The Farmers Canal Company, is in any way concluded, estopped or bound by any adjudication that may have taken place in said proceeding.

Plaintiff admits that ever since the defendant, Tri-State Land Company, became the owner of said property, rights, privileges, immunities and franchises of The Farmers Canal Company, it claimed and still claims the right to 1142-6/7 cubic feet of water per second of time, continually flowing through its irrigation canal and ditches, with a priority dating from September 16th, 1887.

Plaintiff denies that said claim was made by said defendant, Tri-State Land Company, in good faith.

Plaintiff further avers that no formal notice of said claim of the Tri-State Land Company, or its successors, was ever served on or given to the plaintiff herein, or to any of the other parties to this action; that shortly prior to the commencement of this action the plaintiff herein learned by hearsay and rumor, and not otherwise, of the claims and assertions of said Tri-State Land Company and its successors, and at all times after learning of said claims and assertions of said Tri-State Land Company said plaintiff disputed the claim of said Tri-State Land Company and its successors to a priority dating from the 16th day of September 1887 for any amount of water whatsoever in excess of the amount of water that had been actually applied to a beneficial use through and by means of said canal prior to the time that said Tri-State Land Company commenced to re-construct and enlarge the same.

This plaintiff is informed and believes and so alleges that as early as the year 1906 some of the other users of water from the North Platte River, having learned of the alleged claims of the

236 Tri-State Land Company, notified the managing directors and officers of said Company that the other users of water from said river claimed a priority over the Tri-State Land

Company for the amount of water that they had respectively diverted and used from said river, save and except such amount of water as had been diverted from said river and applied to a beneficial use through and by means of said Farmers Canal prior to the enlargement thereof by the Tri-State Land Company.

This plaintiff further avers that said Tri-State Land Company prosecuted said enlargement of said canal with full knowledge that its alleged claim to an appropriation of 1142-6/7 cubic feet of water per second of time, with a priority dating from the 16th day of September 1887, was disputed and would be resisted by the other users of water from said North Platte River.

Plaintiff denies that it made no claim whatever to a right to the use of the water of said river prior to that of said Tri-State Land Company and its successors, and denies that it stood by and allowed said defendant to expend its money in the belief that it had a right to said 1142-6/7 cubic feet of water per second of time, with a priority dating from September 16th, 1887, and denies that said defendant or its successors did believe that it had a right of appropriation to the extent of 1142-6/7 cubic feet of water per second of time, with a priority dating from the 16th day of September 1887, and plaintiff avers that it at all times asserted and claimed a priority of appropriation over that of the Tri-State Land Company and its successors, save and except only so much of the water as had been diverted and applied to a beneficial use through and by means of said canal prior to the time that the Tri-State Land Company commenced the enlargement thereof.

Save and except such portions of said answer as have hereinbefore been specifically admitted and save and except such portions thereof as constitute admissions of facts alleged in plaintiff's amended and supplemental petition, this plaintiff denies each and every allegation in said answer contained.

237 Wherefore, plaintiff prays for a decree as demanded in its amended and supplemental petition.

THE ENTERPRISE IRRIGATION
DISTRICT,
By MORROW & MORROW,

Its Attorneys.

STATE OF NEBRASKA,

County of Scotts Bluff, ss:

W. M. Barbour being duly sworn, deposes and says that he is the Secretary of The Enterprise Irrigation District: that he has read the foregoing reply and knows the contents thereof and that the facts therein stated are true to the best of his knowledge, information and belief.

W. M. BARBOUR.

Subscribed in my presence and sworn to before me this 27th day of January 1911. My commission expires Dec. 6th, 1915.

[SEAL.]

GRACE E. BROWN,
Notary Public.

And afterwards, on the 30th day of January, 1911, there was filed in the office of said Clerk an answer and amended and supplemental cross-petition of the Mitchell Irrigation District, in the words and figures following, to-wit:

238 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

VS.

TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL COMPANY, The Mitchell Irrigation District, Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, Minatare Mutual Canal & Irrigating Company, Steamboat Ditch Company, The Nine Mile Irrigation District, Alliance Irrigating Canal & Water Power Company, Chimney Rock Irrigation Canal & Water Power Company, the Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal & Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Copartnership, under the Firm Name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemental Cross-petition.

Comes now the above named defendant, The Mitchell Irrigation District, and for answer to the amended and supplemental petition of the plaintiff herein alleges:

First. This defendant admits the allegations contained in paragraphs one to nine inclusive, eleven to twenty-one inclusive, twenty-three to twenty-six inclusive and twenty-eight of said amended and supplemental petition, and all other allegations in said amended and supplemental petition contained that are hereafter affirmatively set out in the cross-petition of this defendant; this defendant denies each and every other allegation in said amended and supplemental petition contained, except such allegations as are hereinafter admitted or qualified.

Amended and Supplemental Cross-petition.

For its amended and supplemental cross-petition against the plaintiff and the other defendants to this action, this defendant, for and on behalf of itself and the users of water from its canal herein-after described, alleges:

239 First. That on or about the 20th day of June, 1890, the Mitchell Canal & Irrigating Company, a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska and the laws of the State of Wyoming, posted two (2) notices on the South bank of the North Platte River at a point where the present headgate of the canal of the Mitchell Irrigation District is now located in the County of Laramie and state of Wyoming, of

its intention to appropriate and divert a sufficient quantity of water from said river at such point to fill a ditch seventy-five feet wide and ten feet deep at the headgate, said water to be conducted through said ditch in an easterly direction down the valley of the North Platte River for a distance of twenty-five miles, for irrigation and other useful and beneficial purposes, and thereafter said notices were filed for record in the office of the County Clerk and Recorder of Laramie County, Wyoming.

Second. That on the 18th day of August 1890 the Mitchell Canal & Irrigating Company commenced the construction of said canal and prosecuted the same diligently and uninterruptedly until the month of July 1891, at which time said canal was completed to its present terminus, a distance of twenty-five miles from the point of diversion. That the dimensions of said canal at the headgate *was* seventy-five feet wide and ten feet deep; that below the headgate said canal is of a uniform width of thirty-five feet on the bottom with a carrying capacity of 240 cubic feet of water per second of time.

That said canal passed through the following described lands, to-wit: Sections 9, 16, 15, 22, 23, 26, 25, all in Township Twenty-three (23) North Range Fifty-eight (58); sections 31, 32, 33, 34, 35 and 36 all in Township Twenty-three (23) North, Range Fifty-seven (57); sections 31 and 32 all in Township Twenty-three (23) North Range Fifty-six (56); sections 5, 8, 9, 15, 14, 23, 24, and 25 in Township Twenty-three (23) North, Range Fifty-six (56); Sections Thirty, and to the middle point of section Twenty-nine (29) Township Twenty-two (22), North Range Fifty-five (55) west of the 6th P. M.

Third. That in July, 1891, water was conducted through said canal from the North Platte River to the lands subject to irrigation therefrom, said land being the place of intended use of said water. That during the year 1891, a small portion of said land was watered from said irrigation canal and that the amount of land irrigated from said canal has been increased each and every year thereafter until the year 1895, when all of said land was reclaimed. Said lands are described as follows:

45	acres in lots 1 & 2,	Sec. 13,	Tp. 22	North, Range 55	West, of the 6th P. M.
66	" " lots 3 & 4,	" 18,	" "	" "	" "
15	" " S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 18,	" "	" "	" "
80	" " E. $\frac{1}{2}$, S. W. $\frac{1}{2}$,	" 18,	" "	" "	" "
36	" " N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	" 18,	" "	" "	" "
20	" " W. $\frac{1}{2}$, S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	" 18,	" "	" "	" "
73	" " Lots 3 & 4,	" 19,	" "	" "	" "
73	" " E. $\frac{1}{2}$, S. W. $\frac{1}{4}$,	" 19,	" "	" "	" "
80	" " E. $\frac{1}{2}$, S. E. $\frac{1}{4}$,	" 19,	" "	" "	" "
80	" " W. $\frac{1}{2}$, S. E. $\frac{1}{4}$,	" 19,	" "	" "	" "
150	" " N. W. $\frac{1}{4}$,	" 19,	" "	" "	" "
67	" " Lots 1 & 2,	" 19,	" "	" "	" "
80	" " E. $\frac{1}{2}$, N. W. $\frac{1}{4}$,	" 19,	" "	" "	" "
25	" " Lot 5,	" 20,	" "	" "	" "
40	" " N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	" 20,	" "	" "	" "
40	" " S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	" 20,	" "	" "	" "
40	" " S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	" 20,	" "	" "	" "
34	" " N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	" 20,	" "	" "	" "
30	" " N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 20,	" "	" "	" "
40	" " S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 20,	" "	" "	" "
25	" " Lots 2 & 3,	" 20,	" "	" "	" "
16	" " S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 28,	" "	" "	" "
14	" " S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 28,	" "	" "	" "
12	" " Lot 2,	" 28,	" "	" "	" "
40	" " N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 29,	" "	" "	" "
16	" " S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 29,	" "	" "	" "
36	" " N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	" 29,	" "	" "	" "
20	" " S. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	" 29,	" "	" "	" "
14	" " S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	" 29,	" "	" "	" "
28	" " Lot 1,	" 29,	" "	" "	" "

[illegible]

40	"	N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,
40	"	S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,
80	"	W. $\frac{1}{2}$, S. W. $\frac{1}{4}$,
160	"	N. E. $\frac{1}{4}$,
80	"	E. $\frac{1}{2}$, S. E. $\frac{1}{4}$,
40	"	N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$,
40	"	S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$,
160	"	S. E. $\frac{1}{4}$,
60	"	S. E. $\frac{1}{4}$,
160	"	N. W. $\frac{1}{4}$, W. $\frac{1}{4}$,
80	"	N. $\frac{1}{2}$, S. W. $\frac{1}{4}$,
40	"	S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,
40	"	S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$,

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35 Acres	in	E. $\frac{1}{2}$, N. W. $\frac{1}{4}$,	Sec. 12,	Tp. 22	North, Range 56	West, of the 6th	P. M.
40	"	S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	" 12,	"	"	"	"
40	"	S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	" 12,	"	"	"	"
30	"	N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	" 12,	"	"	"	"
10	"	N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	" 12,	"	"	"	"
22	"	S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	" 12,	"	"	"	"
80	"	N. $\frac{1}{2}$, S. W. $\frac{1}{4}$,	" 12,	"	"	"	"
80	"	W. $\frac{1}{2}$, N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	" 12,	"	"	"	"
40	"	W. C., S. W. $\frac{1}{4}$,	" 12,	"	"	"	"
80	"	N. $\frac{1}{2}$, N. E. $\frac{1}{4}$,	" 13,	"	"	"	"
40	"	S. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	" 13,	"	"	"	"
40	"	S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	" 13,	"	"	"	"
160	"	S. E. $\frac{1}{4}$,	" 13,	"	"	"	"
160	"	S. W. $\frac{1}{4}$,	" 13,	"	"	"	"
40	"	S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	" 13,	"	"	"	"

[illegible]

244

24 Acres in	N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$, " E. $\frac{1}{2}$, N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, " N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, " N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$, " S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$	Sec. 34,	Tp. 23	North, Range 57	West, of the 6th P. M.
10		" 34,	"	"	"
30		" 34,	"	"	"
28		" 35,	"	"	"
20		" 35,	"	"	"

4	" S. W. 1/4, N. E. 1/4,	" 35,	" "	" "	" "
15	" S. E. 1/4, N. W. 1/4,	" 35,	" "	" "	" "
15	" N. E. 1/4, S. W. 1/4,	" 35,	" "	" "	" "
36	" N. W. 1/4, N. W. 1/4,	" 35,	" "	" "	" "
21	" S. W. 1/4, N. W. 1/4,	" 35,	" "	" "	" "
27	" N. W. 1/4, N. W. 1/4,	" 36,	" "	" "	" "
8	" N. E. 1/4, N. W. 1/4,	" 36,	" "	" "	" "
14	" N. W. 1/4, N. E. 1/4,	" 36,	" "	" "	" "
31	" Lot 4,	" 13,	" 23,	" 58,	" "
20	" S. W. 1/4, S. W. 1/4,	" 14,	" "	" "	" "
30	" S. E. 1/4, S. W. 1/4,	" 14,	" "	" "	" "
5	" Lot 3,	" 14,	" "	" "	" "
15	" Lot 4,	" 14,	" "	" "	" "
45	" Lot 5,	" 14,	" "	" "	" "
30	" Lot 6,	" 14,	" "	" "	" "
17	" S. E. 1/4, S. E. 1/4,	" 15,	" "	" "	" "
10	" N. E. 1/4, S. E. 1/4,	" 15,	" "	" "	" "
24	" N. W. 1/4, S. E. 1/4,	" 15,	" "	" "	" "
40	" S. W. 1/4, N. E. 1/4	" 15,	" "	" "	" "
49	" Lot 1,	" 15,	" "	" "	" "
30	" Lot 2,	" 15,	" "	" "	" "
35	" S. E. 1/4, N. W. 1/4,	" 15,	" "	" "	" "
35	" S. W. 1/4, N. W. 1/4,	" 15,	" "	" "	" "
10	" S. W. 1/4, S. E. 1/4,	" 15,	" "	" "	" "
35	" N. E. 1/4, S. W. 1/4,	" 15,	" "	" "	" "
25	" N. W. 1/4, S. W. 1/4,	" 15,	" "	" "	" "
15	" S. E. 1/4, S. W. 1/4,	" 15,	" "	" "	" "
36	" N. E. 1/4, S. E. 1/4,	" 16,	" "	" "	" "
30	" N. W. 1/4, S. E. 1/4,	" 22,	" "	" "	" "
2	" S. W. 1/4, S. E. 1/4,	" 22,	" "	" "	" "

"	S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. $\frac{1}{2}$, N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. $\frac{1}{2}$, N. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. $\frac{1}{2}$, S. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	Lots 1 & 2,	"	"	"	"	"	"	"	"
"	W. $\frac{1}{2}$,	"	"	"	"	"	"	"	"
"	S. $\frac{1}{2}$, S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. $\frac{1}{2}$, S. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. $\frac{1}{2}$, N. W. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"
"	S. $\frac{1}{2}$, N. E. $\frac{1}{4}$,	"	"	"	"	"	"	"	"

245 Fourth. That by virtue of the performance of the acts above enumerated by said Mitchell Canal & Irrigation Company, said Mitchell Canal & Irrigation Company acquired the right to appropriate from the North Platte River a sufficient quantity of water for the irrigation of the above described lands, to-wit: 240 cubic feet per second of time continuously flowing during each and every irrigation season with a priority dating from the date of posting the notices above mentioned, to-wit: On the 20th day of June 1890.

Fifth. That on or about the — day of —, the Mitchell Irrigation District was organized as a corporation under the provisions of an act of the Legislature of the State of Nebraska, entitled: "An act to provide for the organization and government of irrigation districts, and to provide for the acquiring of canals already built or partly constructed, for the acquiring of right of way to build irrigation ditches or canals and other property, for the dividing of certain portions of the territory of the state of Nebraska into irrigation districts, and for said irrigation districts to vote bonds for the purpose of constructing irrigation canals, for the purpose of buying and purchasing by said irrigation districts certain canals already constructed or partially constructed and paying for the same; providing for a system of revenue to be raised by taxation upon the property in said districts, and the manner in which the same shall be done; and holding of elections in said districts for the purpose of electing officers and providing for the management of said districts; also providing for the increase and enlargement of said districts whenever it becomes necessary or best to increase their size." Approved March 26, 1895.

Sixth. That on or about the — day of —, The Mitchell Canal & Irrigation Company sold, assigned, transferred all its rights, title and interest in and to said canal, together with its right to appropriate the water of the North Platte River and all franchises,
246 easements and property acquired by it to the Mitchell Irrigation District defendant herein.

Seventh. That the headgate and point of diversion of this cross-petitioner's irrigation canal is further up the river than the point of diversion of the canals of the plaintiff or any other defendant to this action.

Eighth. This cross petitioner further avers that on or about the 31st day of August, 1887, a corporation known as the Farmers Canal Company was organized and incorporated under the laws of the State of Nebraska and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of said State. That in the spring of 1888 said The Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte River for irrigation purposes, at a point on said river in Scotts Bluff County, Nebraska, where the west line of Section ten (10), Township twenty-three (23) North, Range Fifty-eight, (58), intersects the North Bank thereof. That said point of diversion of the Farmers Canal Company is about a mile further down the river from the headgate of this cross-petitioner. That said The Farmers Canal Company

continued work on said canal until some time in the year 1890 at which time said canal was constructed in an easterly direction from said point of diversion for about ten miles, when said company ceased work thereon. That at said time there was not more than 1500 acres of land susceptible to irrigation from said canal as then constructed and the capacity of said canal was not sufficient to carry water for more than 1000 to 1200 acres of land. That said company did not again resume work on said canal until the spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until sometime in the summer of 1893, when it again ceased work on said canal. That when said company ceased work on said canal in 1893, it had constructed the same for a distance of about fifteen miles from the headgate thereof with a capacity sufficient to irrigate about 2500 to 3000 acres of land. That as
247 completed in 1893 there was not more than 3000 acres of land susceptible of irrigation from said canal and said Company and its grantors never irrigated more than 2000 acres of land from said canal prior to the year 1909. That said Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2000 acres of land.

Ninth. That no further work was done on said canal from the time that the Farmers Canal Company ceased work thereon in the year 1893 until the fall of 1906, when work was again resumed thereon by the defendant Tri-State Land Company, and prosecuted until the fall of 1907. That during the later period said canal was enlarged at the headgate to a width of 90 feet on the bottom and a depth of eleven feet, and extended in an easterly direction for a distance of about fourty miles from the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land.

Tenth. That prior to the commencement of this action said Tri-State Land Company entered into a contract with The Farmers Mutual Canal Company a corporation organized and existing under and by virtue of the laws of the state of Nebraska whereby said Tri-State Land Company agreed to sell and said the Farmers Mutual Canal Company agreed to buy the canal, water rights, appropriations and franchises of said Tri-State Land Company, and plaintiff is informed and believes on said information and belief alleges, that since the making of said contract the said Tri-State Land Company conveyed said canal together with all water rights, appropriations and franchises acquired by it, to said The Farmers Mutual Canal Company, receiving in payment therefor, all of the capital stock of the Farmers Mutual Canal Company, the majority of which stock the Tri-State Land Company still owns and controls. That the Tri-State Land Company and Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 to 40 miles
so as to make it capable of irrigating in all about 30,000
248 acres of land, for the irrigation of which said Company intends to divert and appropriate water through said canal from the North Platte river, which is the only source of supply of the canal of the cross-petitioner herein.

Eleventh. This cross-petitioner further avers on information and belief that on or about the 17th day of July 1896, the Secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of The Farmers Canal Company to appropriate water from the North Platte River; that thereafter and on or about the 19th day of September 1896, said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska, its claim for an appropriation of water from the North Platte River to the extent of 275,000 minors' inches for the irrigation of certain lands in said claim described amounting to 75,000 acres; that thereafter and on or about the 9th day of January, 1897, the Secretary of the State Board of Irrigation did render an opinion on said claim and made the same a matter of record in his office, in which opinion he, the said Secretary found and determined that the ditch or canal of said The Farmers Canal Company heads on the North Bank of the North Platte River in the South West quarter of the North East quarter of Section Three (3), Township Twenty Three (23), North Range Fifty-eight (58) West; that said ditch covers and reclaims certain lands in said opinion described amounting in all to about 30,000 acres; that the priority of the appropriators dated from the 16th day of September, 1887. That the said opinion further states that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of Irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

249 3rd. The amount of the appropriation of water shall not exceed eleven hundred and forty-two and six-sevenths cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience shall indicate as necessary for the production of crops in the exercise of good husbandry; and further, said appropriation under any circumstances shall be limited to one-seventieth ($1/70$) of one cubic foot per second of time for each acre of land to which water had been actually and usefully applied on or about September 1st, 1904. But said opinion contained no findings whatever as to the relative priorities of the various appropriators of water from said stream.

Twelve. This cross-petitioner further avers on information and belief that on the 7th day of April, 1897, the State Board of Irrigation caused a resolution to be entered on its records affirming the opinion of the Secretary of the State Board of Irrigation, on the claims of the Farmers Canal Company above mentioned, and other opinions rendered by said Secretary prior to that date.

Thirteenth. This cross-petitioner further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above refered to and at the time the State Board of Irrigation passed the resolution above refered to affirming said opinion, said Farmers Canal Company had not constructed a canal eighty miles in length; that the claim of said company shows on its face that it had con-

structed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land, nor any part thereof, except about two thousand acres; that at said time said company had not acquired a right to appropriate 1142-6/7 cubic feet of water per second of time from said river, nor any part thereof, except about twenty-eight cubic feet of water per second of time and said opinion and said resolution are erroneous and false in said particulars.

250 Fourteen. This cross-petitioner further avers that neither the Mitchell Irrigation District nor its grantors had any notice whatever of the finding of said claim of the Farmers Canal Company nor any hearing thereon or inquiry in reference thereto, or the opinion of the Secretary of the State Board of Irrigation thereon or the resolution entered upon the records of the State Board affirming said opinion; nor did this cross-petitioner or its grantors acquire any knowledge whatever of the above mentioned transactions of the State Board or its Secretary for several years after they had taken place. That no copy of said opinion and resolution or either of them was ever at any time delivered to this cross-petitioner or to its grantors or filed in the office of the County Clerk of Scotts Bluff County, Nebraska; nor was any certificate signed by the President of said Board and attested by said Secretary or otherwise containing the name or postoffice of said Company for the priority of its appropriation or the amount of water appropriated by it, or the amount of prior appropriation or any other information with reference to said claim of said The Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska, or to the County Clerk of any other County in said state or was any such certificate with reference to the appropriation of this cross-petitioner ever transmitted to the County Clerk of any other county; that neither this cross-petitioner nor its grantor was given any opportunity whatever of appearing before the State Board of Irrigation or its Secretary for the purpose of putting the actual facts with reference to said claim of The Farmers Canal Company and said opinion and resolution are therefore absolutely null and void.

Fifteen. This cross-petitioner further avers that neither The Farmers Canal Company or its grantors or either of them ever appropriated or applied to a beneficial use prior to the year 1909, more

251 than twenty-eight cubic feet of water per second of time, yet notwithstanding this fact the Tri-State Land Company and the Farmers Mutual Canal Company claimed to have acquired through and under the Farmers Canal Company a right to appropriate from the North Platte River 1142-6/7 cubic feet of water per second of time with a priority dating from the 16th day of September, 1887, and said company/s have through their duly authorized officers and agents at various times declared that they have a right of appropriation of water from the North Platte River to the extent of 1142-6/7 cubic feet of water per second of time continuously flowing during the irrigation season of each and every year, which is prior to the right of appropriation acquired by this cross-petitioner.

Sixteenth. This cross-petitioner further avers that during the greater portion of the irrigation season of 1910 said Tri-State Land Company and Farmers Mutual Canal Company did divert from said river several 100 cubic feet of water per second of time in excess of 28 cubic feet of water which said Farmers Mutual Canal Company and Tri-State Land Company claimed as prior to the right of this defendant to divert any water from said river. That notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the relative priorities of appropriations of water made prior to the passage of the law creating said Board and notwithstanding the *the* fact that no adjudication was in fact made by said Board of the relative rights of this cross-petitioner and the other parties to this action, yet because of the rendering of the opinion above mentioned by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation threatened and attempted to shut down the headgate of this cross-petitioner for the purpose of turning down the water which this cross-petitioner was diverting to the headgate of the Farmers Mutual Canal Company and Tri-State Land Company and said State Board refused to limit or restrict said Farmers Mutual Canal Company or Tri-State Land Com-

pany or either of them in the diversion of water from said
252 stream to 28 cubic feet of water per second of time, nor any quantity of water less than 1142-6/7 cubic feet per second of time, but on the contrary said State Board of Irrigation would have caused the headgate of the canal of this cross-petitioner to be closed down and would have refused to permit any water to flow into or through its said canal if this cross-petition would have permitted said State Board to do so, while at the same time that said State Board was attempting to close down the headgate of this cross-petitioner, it allowed the Farmers Mutual Canal Company and Tri-State Land Company to divert as much water from said river as they desired, to the extent of 1142-6/7 cubic feet per second of time. It made no attempt to limit or restrict the use of the water by said Farmers Mutual Canal Company and Tri-State Land Company and that if said State Board of Irrigation succeeded in closing down the headgate of this cross-petitioner, The Farmers Mutual Canal Company would have been diverting the water which this cross-petitioner was entitled to have flow through and into said canal for the irrigation of lands subject to irrigation therefrom.

Seventeenth. This cross petitioner further avers that to give the Farmers Mutual Canal Company or its grantors a priority over the cross petitioner herein to the use of water to the extent of 1142-6/7 cubic feet of water per second of time would be to deprive this cross petitioner and the consumers of water from its said canal of their property without the right to be heard with reference thereto and without due process of law in violation of section one (1) article five (5) and section one (1) of article fourteen (14) of the amendment of the constitution of the United States; that said opinion and said resolution above refer-ed to casts a cloud on this petitioner's title to the appropriation of water from said stream and unless said

cloud is cleared by this court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant this cross petition- or consumers of water under this canal any relief whatever, and will permit said companies to divert all the water of said streams during times of scarcity to the entire exclusion of this cross petitioner and users of water from its canal.

Eighteen. This cross petitioner further avers that after the institution of the state Board of Control of the state of Wyoming no action whatever was taken by said State Board of Control on the notices of appropriation filed and recorded in the County Clerk and Recorder's office of Laramie County, Wyoming by this cross petitioner; and that the State Board of Nebraska never forwarded to this cross petitioner a blank claim for the waters of the state of Nebraska and never gave this cross petitioner any notice whatever of any adjudication of the various rights of the different appropriators of water from the North Platte river, but notwithstanding said fact the State Board of Irrigation of the state of Nebraska, during the irrigation season of 1910, when there was not sufficient water flowing down the North Platte river to supply the various appropriators of water therefrom, attempted to close down the headgate of this cross petitioner and would have done so were it not for the opposition of the Board of Directors of this cross petitioner while at the same time said State Board of Irrigation was permitting the Tri-State Land Company and Farmers Mutual Canal Company to divert as much water as said companies desired to the extent of 1142-6/7 cubic feet of water per second time, and if the said State Board of Irrigation succeeded in closing down the headgate of this cross petitioner said Tri-State Land Company and Farmers Mutual Canal Company would have diverted and appropriated the water to which this cross petitioner was justly entitled to. That said state Board of Irrigation has informed this petitioner that in the future when there is a scarcity of water, it will close down this cross petitioner's headgate and

254 permit the Tri-State Land Company and Farmers Mutual Canal Company to divert water to the extent of 1142-6/7 cubic feet per second of time prior to the right of this cross petitioner to divert any water whatsoever, and this cross petitioner believes that said State Board of Irrigation will carry out said threats unless a decree is entered in this case wherein it is declared that this cross petitioner's right to divert the water from the North Platte river is prior to that of Tri-State Land Company and Farmers Mutual Company save and except only 28 cubic feet of water per second of time.

Nineteen. That the average flow of water in said river at or near the headgate of the canal of this cross petitioner and that of the defendants Farmers Mutual Canal Company and Tri-State Land Company and other parties to this action during part of July and during all the months of August and September, October and November, has been for several years last past and will be in the future much less than the amount of water which said defendants Farmers Mutual Canal Company and Tri-State Land Company claim a right to divert and appropriate prior to the right of this cross petitioner, and if said companies be permitted to divert 1142-6/7 cubic feet of water per second of time prior to the cross petitioner herein, this

cross petitioner and the users of water from its said canal will be deprived from the use of water during the latter part of July and during the months of August, September and October and November for each and every year to the irreparable damage and injury of said cross petitioner and the users of water from its said canal.

Twenty. This cross petitioner further avers that the claim of the Farmers Mutual Canal Company and Tri-State Land Company to the right to appropriate 1142-6/7 cubic feet of water per second of time from the North Platte river during each and every irrigation season is unfounded in truth and in fact and that neither the Farmers Mutual Canal Company or the Tri-State Land Company

or its grantors or either of them ever acquired a right to appropriate from said river any amount of water whatever except a sufficient quantity to irrigate about 2000 acres of land or 28 cubic feet of water per second of time continuously flowing during each irrigation season; that all rights of appropriation acquired by said company or its claims to appropriate water from the North Platte river, if any rights were acquired by said company or either of them, are junior and inferior to the right of appropriation of water from said river acquired by this cross petitioner. That if said Tri-State Land Company or Farmers Mutual Canal Company ever did by virtue of any proceedings taken by said companies or their grantors or either of them or otherwise initiate a right of appropriation which upon application to a beneficial use, would ripen into a right to appropriate water from said river, said rights so initiated if any, have become lost to said Farmers Mutual Canal Company or its grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiation or acquiring said right if said right was ever acquired by said companies or grantors.

Wherefore this cross petitioner prays:

1st. That a decree be entered herein determining and adjudicating the respective amounts of water that the parties to this action have acquired a right to appropriate from said river and the relative right of appropriation.

2nd. That it be adjudged and decreed that this cross petitioner has acquired a right of appropriation from the North Platte river to the extent of 240 cubic feet of water per second of time continuously flowing during each and every irrigation season with a priority dating from the 20th day of June, 1890; that said right of appropriation of the Farmers Mutual Canal Company and its grantors with the exception of 28 cubic feet of water per second of time, and that

the title to said right of appropriation of this cross petitioner be quieted and confirmed in this cross petitioner as against all the parties to this action and to each of them, and that the cloud cast on this cross petitioner's title by reason of the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board confirming said opinion be removed.

3d. That this cross petitioner be granted such further and other relief as may be just and equitable.

4th. That this cross petitioner recover judgment for the costs of this action.

MITCHELL IRRIGATION DISTRICT,

By ———, *Its Attorney.*

STATE OF NEBRASKA,

County of Scotts Bluff, ss:

H. W. Haig of lawful age, being first duly sworn deposes and says: That he is one of the Directors of the Mitchell Irrigation District, cross petitioner herein and has read over the foregoing answer and cross petition and knows the contents thereof and that the facts therein stated are true as he verily believes.

H. W. HAIG.

Subscribed in my presence and sworn to before me this 28th day of January, A. D. 1911.

[SEAL.]

GRACE E. BROWN,
Notary Public.

And afterwards, on the 14th day of February, 1911, there was filed in the office of said Clerk an amended answer and amended and supplemental cross petition of the Steamboat Ditch Company, in the words and figures following, to-wit:

257 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

THE TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL Company, The Mitchell Irrigation District. The Ramshorn Ditch Company, The Gering Irrigation District. The Winters Creek Irrigation Company, The Central Irrigation District. The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Irrigation Company. The Steamboat Ditch Company, The Nine Mile Irrigation District. The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company. The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas W. Wheeler, Charles E. Sweet, William E. Guthrie, a Co-partnership under the Firm Name of The Lucerne Land Company, Defendants.

Answer and Amended and Supplemental Cross-petition.

Comes now the above named defendant, the Steamboat Ditch Company, and for answer to the amended and supplemental petition of the plaintiff herein alleges:

First. This defendant admits the allegations contained in paragraphs 1 to 9 inclusive, 11 to 21 inclusive, 23 to 26 inclusive, and 28, of said amended and supplemental petition, and all other allega-

tions in said amended and supplemental petition contained that are hereafter affirmatively set out in the cross-petition of this defendant. This defendant denies each and every other allegation in said amended and supplemental petition contained except such allegations as are hereinafter admitted or qualified.

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Amended and Supplemental Cross-petition.

For its amended and supplemental cross petition against the plaintiff and the other defendants to this action, this defendant, for and on behalf of itself and the users of water from its canal hereinafter described, alleges:

First. That at all times hereinafter mentioned the Steamboat Ditch Company was and now is a corporation duly organized and existing under and by the laws of the state of Nebraska.

Second. That on the 22nd day of October, 1895, this cross-petitioner, the Steamboat Ditch Company, made application to the state board of irrigation of the state of Nebraska for a permit to appropriate 35 cubic feet of water per second of time from the North Platte river for the purpose of irrigating lands described in said application, which are the same lands hereinafter described. That said application for a permit to appropriate water from the North Platte river was granted by said state board of irrigation of the state of Nebraska, subject to the following limitations and conditions, to-wit:

1. That the amount of appropriation shall not exceed fifteen cubic feet per second of time, and shall be limited to one cubic foot per second of time for each seventy acres of land reclaimed on September 1, 1900.

2. The territory claimed and the amount of water already acquired by prior appropriators from this stream and its tributaries having not yet been determined, therefore formal notice is hereby given that this permit may not carry with it the right to any water whatever, or the right to irrigate all the territory applied for.

Third. That this cross-petitioner did commence the construction of its canal on or about the 22nd day of October, 1895, as in said application described, and did prosecute said work diligently and uninterruptedly to completion, and did complete the same on or before the 31st day of December, 1896.

Fourth. That the headgate of said canal is located on the south bank of the North Platte river, on the southeast quarter of the northwest quarter of section 4, Township 21 north, Range 54 west of the Sixth Principal meridian, from which point said canal extends in a southeasterly direction through Sections 4, 9, 10, 14, 13, and 24 in Township 21 north, Range 54 west, and Sections 19 and 20 in Township 21 north Range 53 west. That said canal below the headgate is 2 feet deep, 16 feet wide on the bottom and 20 feet wide on the top, with a grade of $1\frac{1}{2}$ feet per mile. At three-fifths of a mile below the headgate said canal is 2 feet deep, 10 feet wide on the bottom and 14 feet wide on the top, with a grade of $1\frac{1}{2}$ feet per mile.

At a distance of four miles below the headgate said canal is $1\frac{1}{2}$ feet deep, 8 feet wide on the bottom and 12 feet wide on the top, with a grade of one foot per mile. At a distance of five miles below the headgate said canal is $1\frac{1}{2}$ feet deep, 6 feet wide on the bottom and 8 feet wide on the top, with a grade of one foot per mile. Said canal is sufficiently large to carry a sufficient quantity of water for the irrigation of all the lands hereinafter described.

Fifth. This cross-petitioner further avers that immediately after the completion of said canal water was taken through the same for the irrigation of the lands intended to be watered therefrom. That a portion of said land was irrigated through the year 1897; and that the amount of land irrigated through and by means of said canal was increased each and every year from the year 1897 until the year 1900, when all of said lands had been irrigated. Thereafter, to wit, on the 17th day of July, 1903, said Steamboat Ditch Company, through its proper officers, made proof of application of water to all of the land hereinafter described and filed the same with the Secretary of the state board of irrigation of the state of Nebraska. That at the time said proof was filed 81.60 acres of land *was* irrigated in section 14, township 21, range 54; 42.70 acres in section 13, township 21, range 54; 268.30 acres in Section 24, township 21, range 54; 150 acres in section 19, township 21, range 53; and 111.50 acres in section 30, township 21, range 53; making a total of 654.10 acres of land irrigated from said canal.

Fifth. This cross petitioner further avers that on or about the 31st day of August, 1887, a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the state of Nebraska and ever since said time has been and now is a corporation organized and existing under and by virtue of the laws of said state. That in the spring of 1888 said The Farmers Canal Company commenced the construction of a canal for the purpose of diverting water from the North Platte River at a point on said river in Scotts Bluff County, Nebraska, where the west line of section 10, township 23 north, range 58 west, intersects the north bank thereof, for irrigation purposes. That said point of diversion of said canal of the Farmers Canal Company is directly across the river from the headgate of the canal of this cross-petitioner. That said The Farmers Canal Company continued work on said canal until some time in the year 1890, at which time said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said company ceased work thereon. That at said time there were not more than 1,500 acres of land susceptible to irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 1,000 or 1,200 acres of land. That said company did not again resume work on said canal until the spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the summer of 1893, when it again ceased work on said canal. That when said company ceased work on said canal in 1893 it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about

2,500 or 3,000 acres of land. That as completed in 1893 there
261 were not more than 2,000 acres of land susceptible of irrigation from said canal, and said company and its grantors never irrigated more than 2,000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2,000 acres of land.

Sixth. That no further work was done on said canal from the time that The Farmers Canal Company ceased work thereon in the year of 1893 until the fall of 1906, when work was again resumed thereon and prosecuted until the fall of 1907; that during the latter period said canal was enlarged at the headgate to a width of 90 feet on the bottom and depth of 11 feet, and extended in an easterly direction for a distance of about 40 miles from the headgate thereof.

Seventh. This cross petitioner further avers that at and prior to the date of the issuance of the certificate above set out there never had been more than 2,000 acres of land irrigated from said canal of The Farmers Canal Company, and the owners of said canal and of lands under the same never did divert or appropriate through or by means of said canal, at any time prior to the 2nd day of November, 1907, the date of the certificate above mentioned, more than 28 cubic feet of water per second of time; that said certificate did not contain any statement whatever of the amount of appropriation made prior thereto, and this cross petitioner having at said time actual knowledge of the fact that not more than 28 cubic feet of water per second of time had ever been appropriated through and by means of the canal of The Farmers Canal Company above mentioned, relied on the actual and physical conditions of which this cross petitioner had knowledge and did not know or have any reason to believe that there was any record whatever in the office of the state board of irrigation showing anything to the contrary.

262 Eighth. This crosspetitioner further avers on information and belief that on or about the 17th day of July, 1896, the secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of the Farmers Canal Company to appropriate water from the North Platte river; that thereafter, and on or about the 19th day of September 1896, said Farmers Canal Company filed in the office of the secretary of the State Board of Irrigation of the state of Nebraska its claim for an appropriation of water from the North Platte river to the extent of 275,000 miners' inches for the irrigation of certain lands in said claim described, amounting to 70,000 acres; that thereafter, and on or about the 9th day of January, 1897, the secretary of the state board of irrigation did render an opinion on said claim and made the same a matter of record in his office, in which opinion he, the said secretary, found and determined that the ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte river in the southwest quarter of the southeast quarter of section 3, township 23 north, range 58 west; that said ditch or canal covers and reclaims certain lands in said opinions described amounting in all to

about 80,000 acres; that the priority of the appropriation dated from the 16th day of September, 1887. Said opinion further stated that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz;

1. The water appropriated shall be used for the purpose of irrigation.

2. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3. The amount of the appropriation shall not exceed eleven hundred and forty-two and six-sevenths (1142-6/7) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any
263 circumstances shall be limited to one-seventieth (1/70) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904.

But said opinion contained no finding whatever as to the relative priorities of the various appropriations of water from said stream.

Ninth. This cross petitioner further avers on information and belief that several other claimants for the use of water from the North Platte river had, prior to the 7th day of April 1897, filed with the secretary of the state board of irrigation of the state of Nebraska their respective claims for the use of water from the North Platte river. That the secretary of the state board of irrigation, after making such ex parte inquiry and taking such evidence ex parte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims. That no claimant for water from said river had any notice whatever of the claims for water filed by others, nor had any claimant for water from said river any notice of the opinions of the secretary of the state board of irrigation on the other claims for water from said river. That on the 7th day of April, 1897, the state board of irrigation, without any notice to the claimants of appropriations of water from said river, or any of them, and without the knowledge of this crosspetitioner, caused a resolution to be entered on its records affirming all opinions rendered by the said secretary of said board prior to that date, including the opinion rendered on the claim of the Farmers Canal Company.

Tenth. This crosspetitioner further avers that at the time the secretary of the state board of irrigation rendered the opinion above referred to, and at the time the said state board of irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty miles
264 in length. That the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length. That said company had not acquired an appropriation of water for the irrigation of 80,000 acres of land, nor any part thereof, except about 2,000 acres. That at said time said company had not acquired a right to appropriate 1142-6/7 cubic feet

of water per second of time from said river, nor any part thereof, except only about 28 cubic feet of water per second of time; and said opinion and said resolution are erroneous and false in said particulars.

Eleventh. This crosspetitioner further avers that at the time it received the certificate of appropriation above mentioned it had no notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon, or inquiry with reference thereto, or of the resolution entered upon the records of said board affirming said opinion; nor did this crosspetitioner acquire any knowledge whatever of the above mentioned transactions of said board and its secretary until after the commencement of this action by the plaintiff herein. That no copy of said opinion and resolution, or either of them, was ever at any time delivered to this crosspetitioner or filed in the office of the county clerk of Scotts Bluff County, Nebraska, or of any other county in the state of Nebraska, nor was any certificate signed by the president of said board and attested by the secretary of otherwise of the priority of amount of the appropriation of The Farmers Canal Company, or any other information with reference to the claim of said Company ever transmitted to the county clerk of Scotts Bluff county or any other county in the state of Nebraska; and, by reason of the failure of the certificate forwarded to this cross-petitioner by the state board of irrigation to state the amount of prior appropriations from said stream or from said watershed, this crosspetitioner was led to believe and did believe that said state board of irrigation had not determined the amount of the appropriation of The Farmers Canal Company

and had been allowed an appropriation to the extent of
265 1142-6/7 cubic feet of water per second of time, or any other amount in excess of 28 cubic feet of water per second of time, or had it stated the amount of prior appropriations, so as to lead this crosspetitioner to inquire as to the amount of water allowed each prior appropriator, this crosspetitioner would have discovered the existence of the opinion and resolution above referred to and would have appealed from the allowance of the amount of water therein referred to, prior to the appropriation of this crosspetitioner; and the reason that this crosspetitioner had not made an investigation upon receipt of said certificate of appropriation was because it believed that the determination of the amount of prior appropriations was to be made at some subsequent time and that it would have notice and right to be heard with reference thereto.

Twelfth. This crosspetitioner further avers that The Farmers Mutual Canal Company has through certain conveyances become the owner of the said ditch or canal formerly owned by the Farmers Canal Company and has succeeded to all the rights acquired by said The Farmers Canal Company, and the defendant Tri-State Land Company is the owner of a majority or controlling interest in the capital stock of The Farmers Mutual Canal Company, and said The Farmers Mutual Canal Company claims to have acquired, through and under The Farmers Canal Company, a right to appropriate from the North Platte river 1142-6/7 cubic feet of water

per second of time, with a priority dating from the 16th day of September, 1887, and will, unless restrained by a decree of this court, construct and maintain a dam across said river immediately below the headgate of its canal and above the headgate of the canal of this crosspetitioner, for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as may be flowing in said river.

Thirteenth. This crosspetitioner further avers that during the greater portion of the irrigation season of 1910 said The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time in excess of 28 cubic feet of water per second of time. That the State Board of

266 Irrigation did during said season of 1910 refuse to limit or restrict said The Farmers Mutual Canal Company in the diversion of water from said stream to 28 cubic feet of water per second of time, or to any quantity less than 1142-6/7 cubic feet of water per second of time. That while the state board of irrigation was permitting said The Farmers Mutual Canal Company to divert from said river large quantities of water in excess of 28 cubic feet of water per second of time, it caused the headgate of the canal of this crosspetitioner to be closed down and refused to permit any water to flow into or through the canal of this cross petitioner. That the only reason or excuse offered by the state board of irrigation for closing down the headgate of the canal of this cross petitioner and permitting The Farmers Mutual Canal Company to divert large quantities of water from said river, to which this cross petitioner was entitled, was the fact that the secretary had rendered the opinion above mentioned with reference to the claim of The Farmers Canal Company and said board had passed the resolution above mentioned affirming said opinion.

Fourteenth. That the said action of the state board of irrigation in closing down the headgate of the canal of this cross petitioner and permitting The Farmers Mutual Canal Company to divert large quantities of water from said river has resulted in depriving this cross petitioner and the users and consumers of water from its canal of their property without a right to be heard thereon and without due process of law. That said opinion and said resolution above referred to in reference to the claim of The Farmers Canal Company constitute a cloud on this cross petitioner's title to an appropriation of water from said stream, and unless said cloud is removed or cleared by a decree of this court the state board of irrigation will continue in the future as it has in the past to allow

267 The Farmers Mutual Canal Company to divert from said river the water which this cross petitioner and the consumers of water from its canal have acquired a prior right to appropriate, and will thus continue to deprive the cross petitioner and the users of water from its canal of their property without due process of law.

Fifteenth. That the average flow of water in said river at or near the headgate of the canal of this cross petitioner and that of the defendant, The Farmers Mutual Canal Company, during part of July

and during all of the months of August, September, October and November has been for several years last past, and will be in the future, much less that 1142-6/7 cubic feet of water per second of time, the amount which The Farmers Mutual Canal Company claims a right to divert and appropriate, and which said company will divert and appropriate, from said river, and which the state board of irrigation will permit said The Farmers Mutual Canal Company to divert and appropriate from said river to the entire exclusion of this cross petitioner, unless the opinion and resolution of the state board of irrigation on the claim of the Farmers Canal Company above mentioned is vacated, set aside and held for naught by a decree of this court.

Sixteenth. This cross petitioner further avers that neither The Farmers Mutual Canal Company nor its grantors ever acquired a right to divert and appropriate more than 28 cubic feet of water per second of time prior to the right acquired by this cross-petitioner; and all other rights, if any, that have been acquired by said The Farmers Mutual Canal Company or its grantors, or either of them, are junior and inferior to the right of appropriation of water from said river acquired by this cross petitioner. That if the Farmers Mutual Canal Company, or its grantors, ever did, by virtue of any proceedings taken by said companies, or either of them, or otherwise, initiate a right of appropriation of water from said stream, which upon application to a beneficial use would ripen into an appropriation, said rights so initiated, if any, have become lost to said

268 The Farmers Mutual Canal Company and its grantors by non-use and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged rights, if any rights were in any manner ever initiated or acquired by said company or its grantors.

Wherefore this cross petitioner prays:

1. That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired a right to appropriate from said river and the relative priorities of said rights of appropriation.

2. That it be adjudged and decreed that this cross petitioner has acquired a right of appropriation of water from the North Platte river to the extent of 35 cubic feet of water per second of time continually flowing during each and every irrigation season with a priority dating from the 22nd day of October, 1895, and that said right is prior to the right of appropriation of The Farmers Mutual Canal Company and its grantors, with the exception of 28 cubic feet per second of time, and that the title to said right of appropriation of this cross petitioner be quieted and confirmed in this cross petitioner as against all of the parties to this action and each of them, and that the cloud cast on this cross petitioner's title by reason of the opinion of the secretary of the state board of irrigation and the resolution of said board confirming said opinion be removed.

3. That the defendants, the Tri-State Land Company and The Farmers Mutual Canal Company, and each of them, be enjoined and restrained from decreasing or diminishing the flow of water of

said river at the headgate of the canal of this cross petitioner below the amount of water which said crosspetitioner has acquired a right to appropriate, to wit, 35 cubic feet of water per second of time continuously flowing during each and every irrigation season, and the amount of water, if any, which it may be adjudged and decreed that this cross petitioner shall permit to flow down the channel of said river past its headgate.

289 4. That this cross-petitioner be granted such other and further relief as may be just and equitable.

5. That this crosspetitioner have and recover judgment for the costs of this action.

THE STEAMBOAT DITCH COMPANY,
By MORROW AND MORROW, *Its Attorneys.*

STATE OF NEBRASKA,
County of Scotts Bluff, ss:

Robt. M. Lee, being first duly sworn, deposes and says that he is the President of the Steamboat Ditch Company, the crosspetitioner herein; that he has read the foregoing answer and amended and supplemental cross-petition and knows the contents thereof, and that the facts therein stated are true as he verily believes.

ROBT. M. LEE.

Subscribed in my presence and sworn to before me this 9 day of Febr. A. D. 1911.

My commission expires Aug. 25, 1914.

E. O. HARSHMAN,
Notary Public.

And afterwards, on the 23rd day of March, 1911 there was filed in the office of said Clerk a separate answer and cross petition of the Castle Rock Irrigation Canal and Water Power Company, in the words and figures following, to-wit:

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In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

TRI-STATE LAND COMPANY, THE FARMERS MUTUAL CANAL COMPANY, Mitchell Irrigation District, Ramshorn Ditch Company, Gering Irrigation District, Winters Creek Irrigation Company, Central Irrigation District, Castle Rock Irrigation Canal & Water Power Company, Minatare Mutual Canal & Irrigation Company, Steamboat Ditch Company, Nine Mile Irrigation District, Alliance Irrigating Canal & Water Power Company, Chimney Rock Irrigation Canal & Water Power Company, Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal & Water Power Company, and Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-partnership under the Firm Name of The Lucerne Land Company, Defendants.

Separate Answer and Cross Petition of the Castle Rock Irrigation Canal and Water Power Company to the Plaintiff's Amended and Supplementary Petition.

Comes now the above named defendant, the Castle Rock Irrigation Canal and Water Power Company and for answer to the amended and supplemental petition of the plaintiff herein, alleges:

(1) This defendant admits the allegations contained in paragraphs one to nine inclusive, eleven to twenty-one inclusive, twenty-three to twenty-six and twenty-eight of said amended and supplemental petition, and all other allegations in said amended and supplemental petition, as are hereinafter set out in this cross petition. This defendant denies each and every other allegation in said amended and supplemental cross-petition contained except such allegations as are hereinafter admitted or qualified.

Cross Petition.

Comes now the Castle Rock Irrigation Canal & Water Power Company and for its cross petition against the plaintiff and other defendants to this action, for and in behalf of itself and the users of water from its canal hereinafter described, alleges:

(1) That at all times hereinafter mentioned the Castle Rock Irrigation Canal & Water Power Company was and now is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska.

271 (2) That on or about the 18th day of April, 1889, this cross-petitioner, the Castle Rock Irrigation Canal & Water Power Company posted a notice on the South bank of the North Platte river in the South West quarter of Section Three (3), Township Twenty-one (21) North Range Fifty Four (54) West of the 6th P. M., said point being 1214 feet North 9° 30' East from the South East corner of Section Four (4) Township Twenty-one (21) North, Range Fifty Four (54) West of the 6th P. M., in Scotts

Bluff County, Nebraska, of their intention to appropriate and divert a sufficient supply of water from said river at said point to fill a ditch or canal 80 feet wide at the bottom and 85 at the top and two and one-half feet deep at the point of diversion, said water to be conducted through said canal in a Southeasterly direction down the valley of the North Platte river and terminating in the vicinity of Sections One (1) and Twelve (12) in Township Twenty (20), North Range Fifty Two (52) West of the 6th P. M., for irrigation and other uses and beneficial purposes, and on the 25th day of April, 1889, said notice was filed for record in the office of the County Clerk and Recorder and recorded in Volume "A" of Irrigation Records at Page 67.

(3) That on or about the 1st day of June, 1889, this cross-petitioner commenced the construction of said canal and prosecuted the same diligently and uninterruptedly until the 1st day of January, 1897, at which time said canal was completed for a distance of about $19\frac{1}{4}$ miles; that the dimensions of said canal were as follows: 48 feet wide in the clear, carrying two feet of water at low water time that immediately below said headgate said canal is 20 feet wide on the bottom, 26 feet wide on top and $2\frac{1}{2}$ feet in depth with a grade of 2 feet per mile; that at four miles below the headgate said canal was 3 feet deep, 18 feet wide on the bottom, 24 feet wide on the top with a grade of $1\frac{1}{2}$ feet per mile. At 10 miles below the headgate said canal 3 feet deep, 8 feet wide on the bottom and 14 feet wide on top with a grade of 1 foot per mile.

272 At ten miles below the headgate said canal divides into two branches, the main branch of which is 3 feet in depth, 8 feet wide on the bottom and 14 feet wide on the top, with a grade of 1 foot per mile. The valley branch of said canal at said point is $2\frac{1}{2}$ feet deep, 10 feet wide on the bottom and 14 feet wide on the top, with a grade of 5 feet, and said canal passes through the following described lands, to-wit:

Beginning at the point where said notice was posted, through Section 4, in section 9, Sec-. 10, 11, 14, 13, 24 in Township 21, Range 54, through sections 19-30-29-28 and 33 in Township 21, Range 53, dividing at the North West Corner of the North East quarter of section 33, Township 21, Range 53, the main branch extending through Sections 33 and 34, in Township 21, Range 53; Section 4-8-10-15-14-11, and terminating at a point in the South West quarter of the South West quarter of Section 12, Township 20, Range 53, West of the 6th P. M. The valley branch extending through Sections 33-38-27-34-35-36 all in Township 21 Range 53 and through Section- 3 and 2 and terminating at a point in the South East quarter of the South West quarter of Section 1, Township 20, Range 53.

(4) That on the 4th day of June, 1893, water was conducted through said canal from the North Platte river to the lands subject to irrigation therefrom, said land being the place of intended use of said water; that about 1240 acres of land was irrigated from said canal during the year 1893 and during each and every year thereafter, the amount of water conducted through said canal and the amount of land irrigated therefrom had been increased until the

present time, when all lands subject to irrigation therefrom had been irrigated and re-claimed. Said lands are described as follows, to-wit: All that part of the following described lands which lie between said ditch and the North Platte river, To-wit:

The south East quarter of Section 4, South West quarter of Sec. 3, North Half and South East quarter of Section 10, South
273 West quarter of Section 11, North Half of Section 14, South East quarter of Section 14, South Half of Section 13, North half and North East quarter of South East quarter of Section 24, all in Township 21, North, Range 54, West of the 6th P. M., Sections 19-20-28-34-35-36 and North half of Section 29, South West quarter of Section 21 South West quarter of section 27, North East quarter of section 33, all in Township 21 North, Range 52, West of the 6th P. M., East half of sections 4 and 9, North half of section 15, Sections 1-2-3-10-11-12, all in Township 20, North, Range 53, West of the 6th P. M. amounting in all to about 5780 acres.

(5) That by virtue of the performances of the acts above enumerated by said the Castle Rock Irrigation Canal & Water Power Company, the said Castle Rock Irrigation Canal & Water Power Company has acquired and is now the owner of the right to appropriate from the North Platte river a sufficient quantity of water for the irrigation of the above described lands, to-wit: 82 4/7 cubic feet of water per second of time continuously flowing during each and every irrigation season with a priority from the time of posting the above mentioned notice, the 18th day of April, 1889.

(6) This cross petitioner further avers that on or about the 15th day of May, 1895, a transcript of the above mentioned notice duly certified by the County Clerk of Scotts Bluff County, Nebraska, was filed in the office of the Secretary of the State Board of Irrigation of the State of Nebraska; that thereafter this cross petitioner filed its claim for the use of water appropriated by it in the office of the Secretary of the State Board of Irrigation; that on or about the 17th day of July, 1896, the Secretary of the State Board of Irrigation made certain inquiry and took certain evidence regarding the claim of this cross petitioner, and on the 7th day of January, 1897, the said Secretary of the State Board of Irrigation rendered an opinion

on said claim and made the same a matter of record in his
274 office, in which opinion said Secretary found and determined that said, the Castle Rock Irr. & W. P. Company had constructed a ditch or canal as stated in this cross petition; that said ditch or canal covers or reclaims the lands herein described. That the priority of the appropriation of the said, the Castle Rock Irrigation Canal & Water Power Company dated from the 18th day of April, 1889.

(7) Petitioner further avers that said opinion of the Secretary of the State Board of Irrigation contained no findings whatever regarding any other appropriation or claim for the use of water from said stream nor did said opinion determine or find that any other person, company, corporation or party was entitled to appropriate any water whatever from said stream either prior or subsequent to said The Castle Rock Irrigation Canal & Water Power Company

nor did said opinion contain any finding whatever as to the relative priority of the various appropriators from said stream; that said Castle Rock Irrigation Canal & Water Power Company had no notice of any person, company, corporation or party claiming the right to appropriate the water from said stream prior to that of said Castle Rock Irrigation Canal & Water Power Company.

(8) Petitioner further avers on information and belief that several other claimants for the use of water from the North Platte River had prior to the 7th day of April 1897, filed with the Secretary of the State Board of Irrigation of the State of Nebraska, their respective claims for the use of water from the North Platte river; that the Secretary of the State Board of Irrigation after making such ex parte inquiry and taking such evidence ex parte as he deemed necessary and advisable on each of said claims, rendered a separate opinion on each of said claims, that no claimant for water from said river had any notice whatever of the claims for water filed by others, nor had any claimant for water from said river any notice of the opinions of the Secretary on the other claims for water from said river; that on the 7th day of April, 1897, the State Board
275 of Irrigation, without any notice to the claimants of appropriations of water, or any of them and without the knowledge of this cross-petitioner, caused a resolution to be entered on its records affirming all opinions rendered by the said Secretary of the State Board of Irrigation prior to that date, including the opinion rendered on the claim of The Castle Rock Irrigation Canal and Water Power Company.

(9) Petitioner further avers that The Castle Rock Irrigation Canal & Water Power Company, defendant and cross-petitioner herein, had no notice, knowledge or information concerning the various opinions rendered by the said Secretary of the State Board of Irrigation, prior to the 7th day of April, 1897, on the claims of others for rights to the use of water from the North Platte River or any of them, or of the passage of the above mentioned resolution affirming said opinions and neither this cross-petitioner or its officers acquired any knowledge of said action for several years thereafter, nor until shortly prior to the commencement of this action, and this defendant and cross-petitioner had no notice or information that the State Board of Irrigation ever intended to do anything more than make a record of the claim of The Castle Rock Irrigation Canal & Water Power Company in its office.

(10) Petitioner further avers that during each and every month of each and every irrigation season, with the exception of one or two weeks during the extremely low water of some seasons, there has been a sufficient quantity of water flowing down the channel of said river to the headgate of the canal of this Petitioner to supply a sufficient quantity of water to be diverted into said canal to irrigate all of said lands.

That prior to the time said lands were irrigated they were, on account of insufficient moisture and rainfall, desert in character and incapable of producing crops, but since irrigating the same they became very productive and valuable, and have been brought to

a high state of cultivation; that since the application of water to said lands, through and by means of said canal, they — been
276 used in raising various kinds of vegetables, grains, hay and other crops adapted to the climatic conditions of the country that some of said lands have been planted to alfalfa and some to shrubbery, trees and orchards, which are all in a good flourishing condition, owing to the fact that they have been irrigated, and it is absolutely necessary to continue to irrigate the same during the various months of the irrigation season of each year, in order to preserve said crops, trees, shrubbery and orchards from ruin and destruction; that without irrigation said lands would become practically valueless and the prosperous homes now located thereon would be destroyed and ruined.

(11) Petitioner further avers that on or about the 31st day of August, 1887 a corporation known as The Farmers Canal Company was organized and incorporated under the laws of the State of Nebraska, and ever since said time has been and now is a corporation organized and existing under and by virtue of the said state. That in the Spring of 1889 said The Farmers Canal Company commenced the construction of a canal for the purposes of diverting water from the North Platte River at a point on said river, in Scotts Bluff County, Nebraska, where the West line of Section 10, Township 23 north, Range 58 west, intersects the north bank thereof, for irrigation purposes. That said point of diversion of the canal of the said The Farmers Canal Company is about 30 miles up the river from the headgate of the canal of this petitioner. That said The Farmers Canal Company continued work on said canal until sometime in the year 1890, at which time, said canal was constructed in an easterly direction from said point of diversion for a distance of about ten miles, when said Company ceased work thereon. That at said time there was not more than 1500 acres of land susceptible of irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than 1000 to 1200 acres of land. That said Company
277 did not again resume work on said canal until the Spring of 1892, at which time it undertook to enlarge and extend said canal and continued work thereon until some time in the summer of 1893, when it again ceased work on said canal. That when said company ceased work on said canal, in 1893 it had constructed the same for a distance of about 15 miles from the headgate thereof, with a capacity sufficient to irrigate about 2500 to 3000 acres of land. That as completed in 1893 there were not more than 2000 acres of land susceptible of irrigation from said canal, and said company and its grantees never irrigated more than 2000 acres of land from said canal prior to the year 1909. That said The Farmers Canal Company never resumed work on said canal and never extended the same so as to make it capable of irrigating more than 2000 acres of land. That on or about the 23rd day of December 1901 said canal of The Farmers Canal Company together with all its property, rights and franchises, was sold under a decree of foreclosure to one Roberts Walker, who, on or about the 20th day of

October 1904, sold and conveyed the same to The Tri-State Land Company, one of the defendants above named, which is a corporation organized and existing under and by virtue of the laws of the State of New Jersey.

(12) That no further work was done on said canal from the time that The Farmers Canal Company ceased work thereon in the year 1893 until the defendant, the Tri-State Land Company, commenced to enlarge and extend the same in September, 1906. That said defendant The Tri-State Land Company prosecuted work thereon from September 1906 until the Fall of 1907, and did enlarge said canal at the headgate and for some distance below the headgate to a width of 90 feet at the bottom and a depth of 11 feet, and did extend the same in an Easterly direction for a distance of about 40 miles from the headgate thereof, so as to make it capable of irrigating about 40,000 acres of land.

278 That prior to the commencement of this action said Tri-State Land Company entered into a contract with the Farmers Mutual Canal Company, a corporation organized under the laws of the State of Nebraska, whereby said Tri-State Land Company agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal, water rights, appropriations and franchises of said Tri-State Land Company, and Petitioner is informed and believes and on said information and belief alleges that since the making of said contract said Tri-State Land Company has conveyed said canal together with all water rights appropriations and franchises acquired by it to the said The Farmers Mutual Canal Company receiving in payment therefor all of the capital stock of the Farmers Mutual Canal Company a majority of which said capital stock said Tri-State Land Company still owns and controls. That the Tri-State Land Company and said Farmers Mutual Canal Company are now preparing to extend said canal an additional 30 to 40 miles so as to make it capable of irrigating in all about 85,000 acres of land, for the irrigation of which said companies intend to divert and appropriate water through said canal from the North Platte river, which is the only source of supply of the canal of the plaintiff herein.

(13) Petitioner further avers on information and belief that on or about the 17th day of July, 1896, the Secretary of the State Board of Irrigation of the State of Nebraska made certain inquiries and took certain evidence regarding the right of the Farmers Canal Company to appropriate water from the North Platte river; that thereafter and on or about the 19th day of September 1896 said Farmers Canal Company filed in the office of the Secretary of the State Board of Irrigation of the state of Nebraska, its claim for an appropriation of water from the North Platte River to the extent of 275,000 minor inches for the irrigation of certain lands in said claim described, amounting to 79,000 acres; that thereafter and on or about the 9th day of January 1897, the Secretary of the

279 State Board of Irrigation did render an opinion of said claim and made the same a matter of record in his office, in which opinion, he, the said Secretary, found and determined that the

ditch or canal of said The Farmers Canal Company heads on the north bank of the North Platte River in the southwest quarter of the southeast quarter of Section three, township twenty-three north, range fifty-eight west; that said ditch is about eighty-one miles in length; that said ditch or canal covers and reclaims certain lands in said opinion described amounting in all to about 80,000 acres; that the priority of the appropriation dated from the 16th day of September, 1887. Said opinion further stated that the claim of said Farmers Canal Company is allowed subject to the following limitations and conditions, viz.:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd. The amount of the appropriation shall not exceed eleven hundred and forty-two and six sevenths ($1142\frac{6}{7}$) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and further, said appropriation under any circumstances, shall be limited to one-seventieth ($1/70$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

But said opinion contained no finding whatever as to relative priorities of the various appropriations of water from said stream.

(14) Petitioner further avers on information and belief that on the 7th day of April 1897, the said State Board of Irrigation caused a resolution to be entered on its records affirming the *the* 280 opinion of the Secretary of the State Board of Irrigation on the claim of the Farmers Canal Company above mentioned, and other opinions rendered by said Secretary prior to said date.

(15) Petitioner further avers that at the time the Secretary of the State Board of Irrigation rendered the opinion above referred to and at the time the said State Board of Irrigation passed the resolution above referred to, affirming said opinion, said The Farmers Canal Company had not constructed a canal eighty miles in length; that the claim filed by said company shows upon its face that it had constructed a canal only nineteen miles in length; that said company had not acquired an appropriation of water for the irrigation of eighty thousand acres of land, nor any part thereof, except about two thousand acres; that at said time said company had not acquired a right to appropriate $1142\frac{6}{7}$ cubic feet of water per second of time from said river nor any part thereof, except about twenty-eight cubic feet of water per second of time; and said opinion and said resolution are erroneous and false in said particulars.

(16) Petitioner further avers that The Castle Rock Irrigation Canal & Water Power Company, defendant and cross petitioner herein, had no notice whatever of the filing of said claim of The Farmers Canal Company or of any hearing thereon, or inquiry with reference thereto, or of the opinion of the Secretary of the State Board of Irrigation thereon, or of the resolution entered upon the records

of said Board affirming said opinion; nor did this defendant and cross-petitioner acquire any knowledge whatever of the above mentioned transactions of said Board and its Secretary for several years after they had taken place; that no copy of said opinion and resolution, or either of them, was ever at any time delivered to the Petitioner herein or to its officers, or filed in the office of the County Clerk of Scotts Bluff County, Nebraska; nor was any certificate signed by the president of said State Board and attested by the Secretary, or otherwise containing the name of the post-office address 281 of said company or the priority of its appropriation, or the amount of water appropriated by it, or the amount of prior appropriations or any other information with reference to said claim of said The Farmers Canal Company ever transmitted to the County Clerk of Scotts Bluff County, Nebraska, or to the County Clerk of any other county in said state, nor was any such certificate with reference to the appropriation of the Petitioner herein ever transmitted to the County Clerk of said County or the County Clerk of any other County. That neither the Petitioner herein nor its officers was given any opportunity whatever of appearing before the State Board of Irrigation or its Secretary for the purpose of showing the actual facts with reference to said claim of The Farmers Canal Company and said opinion and resolution are therefore absolutely null and void.

(17) Petitioner further avers that neither the Farmers Canal Company nor its grantees, nor either of them, ever appropriated or applied to a beneficial use prior to the year 1909, more than twenty-eight cubic feet of water per second of time, yet notwithstanding this fact, the Tri-State Land Company and The Farmers Mutual Canal Company claim to have acquired through and under the Farmers Canal Company, a right to appropriate from the North Platte River 1142-6/7 cubic feet of water per second of time with a priority dating from the 16th day of September 1887 and said Companies have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte River to the extent of 1142-6/7 cubic feet per second of time, continually flowing during the irrigation season of each and every year which is prior to the right of appropriation acquired by this petitioner and have threatened to construct and maintain a dam across said river immediately below the headgate of said canal and above the headgate of the canal of the plaintiff herein for the purpose of intercepting and diverting into said canal said quantity of water or so much thereof as 282 may be flowing in said river.

(18) Petitioner further avers that during the greater portion of the irrigation season of 1910 said Tri-State Land Company and The Farmers Mutual Canal Company did divert from said river several hundred cubic feet of water per second of time, and by so doing did reduce the volume of water flowing in said river at the headgate of the canal of this Petitioner much below the quantity of water to which the Petitioner herein was entitled to divert from said river; that notwithstanding the fact that the State Board of Irrigation has no jurisdiction or authority to try or adjudicate the

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relative priorities of appropriations of water made prior to the passage of the law creating said Board and notwithstanding the fact that no adjudication was in fact made by said Board of the relative rights of the Petitioner and the other parties to this action, yet because of the rendering of the opinion above mentioned by the Secretary of the State Board of Irrigation and the passage of the resolution above mentioned, said State Board of Irrigation refused to limit or restrict said Farmers Mutual Canal Company and Tri-State Land Company, or either of them, in the diversion of water from said stream to twenty-eight cubic feet of water per second of time or to any quantity less than $1142\frac{6}{7}$ second feet but on the contrary said State Board of Irrigation caused the headgate of the Petitioner herein to be closed down and refused to permit any water to flow into or through its said canal, while at the same time it allowed the Farmers Mutual Canal Company and Tri-State Land Company to divert as much water from said river as they desired to the extent of $1142\frac{6}{7}$ cubic feet of water per second of time; that during all of the time that the headgate of the canal of the Petitioner herein was closed by the State Board of Irrigation as aforesaid, the said Farmers Mutual Canal Company and Tri-State Land Company were diverting several hundred cubic feet of water per second of time which the Petitioner herein was entitled to have flow into and through its said canal for the irrigation of land subject to irrigation therefrom.

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(19) Petitioner further avers that to give The Farmers Mutual Canal Company or its grantors a priority over the Petitioner herein to the use of water to the extent of $1142\frac{6}{7}$ cubic feet of water per second of time would be to deprive the Petitioner herein and the consumers of water from its said canal of their property without a right to be heard with reference thereto and without due process of law; that said opinion and said resolution above referred to constitute a cloud on Petitioner's title to an appropriation of water from said stream and unless said cloud is cleared by a decree of this Court, the State Board of Irrigation will continue in the future as it has in the past to refuse to grant the Petitioner herein or the consumers of water under its canal any relief against the unlawful diversion of the water of said stream by The Farmers Mutual Canal Company and Tri-State Land Company, and will permit said companies to divert all of the water of said stream during times of scarcity to the entire exclusion of the Petitioner and the users of water from its canal.

(20) Petitioner further avers that the North Platte River derives its supply of water from various streams heading in the mountains of Colorado and Wyoming, and that the amount of water flowing therein varies greatly at different times in the year. That during the months of April, May, and June the amount of water usually flowing in said river is sufficient to supply all the canals thus far constructed for the purpose of diverting water therefrom. That during July and August of each year the amount of water flowing in said river at or near the headgate of the canal of the Petitioner and that of the other defendants, The Farmers Mutual Canal Company and Tri-State Land Company, ranges from 100 to 2000 cubic

feet per second of time. That during September and October of each year the flow of water in said river at or near the headgates of the petitioner's canal and that of said defendants ranges from 50 to

284 2000 feet per second of time, and the average flow of said stream during said months is about 452 cubic feet per second of time. That during November of each year the flow of water in said river at or near the headgate of the canal of the Petitioner and that of said defendants ranges from 250 to 2000 cubic feet per second of time, and the average flow of said river during said month is about 908 cubic feet per second of time.

That the average flow of water through said river at or near the headgate of the canal of the Petitioner and that of said defendants during the months of July, August, September, October and November has been for several years last past, and will be in the future much less than the amount of water which said defendants claim a right to divert and appropriate from said river prior to that of Petitioner, and if said Company be permitted to divert 1142-6/7 cubic feet of water per second of time prior to the Petitioner herein, the said plaintiff and the users of water for irrigation purposes during the months of July, August, September, October and November of each and every year, to the irreparable damage and injury of the Petitioner herein and the users of water from its said canal.

(21) Petitioner further avers that the claim of said Tri-State Land Company and The Farmers Mutual Canal Company to a right to appropriate 1142-6/7 cubic feet of water per second of time from the North Platte River during each and every irrigation season with a priority dating from the 16th day of September 1887, is unfounded in truth and in fact; that neither said Farmers Mutual Canal Company nor its grantors, nor either of them, ever acquired a right to appropriate from said river any amount of water whatsoever except a sufficient amount to irrigate about 2000 acres of land, or 28 cubic feet of water per second of time, continually flowing during each irrigation season. That all rights of appropriation acquired by said The Farmers Mutual Canal Company and its grantors to appropriate water from the North Platte River, if any rights were acquired by them, or either of them are subsequent, junior and inferior to the right of appropriation acquired by the Petitioner herein. That if said Tri-State Land Company and the Farmers Mutual Canal Company ever did, by virtue of any proceedings taken by said companies of their grantors, or either of them, or otherwise, initiate a right of appropriation which upon application to a beneficial use would ripen into a right to appropriate waters from said river, said rights so initiated if any, have become lost to said Companies and their grantors by non-user and abandonment thereof for a period of more than ten years from the date of initiating or acquiring said alleged right, if any such was in any manner initiated or acquired by said Companies or their grantors. That notwithstanding the fact that the claim of the Tri-State Land Company and Farmers Mutual Canal Company to an appropriation of 1142-6/7 cubic feet per second of time during each and every irrigation season, with a priority dating from the 16th day of September 1887, is unfounded in truth and in fact that the rights acquired by said com-

panies and their grantors are subsequent, junior and inferior to the right of appropriation of water from said river acquired by the petitioned herein said companies will, unless restrained by an order or decree of this court, construct a dam across said river at the headgate of said canal and will divert into said canal, during each irrigation season, all of the water flowing in said river to the extent of 1142-6/7 cubic feet per second of time. That during the greater portion of each and every irrigation season there is less than 1142-6/7 cubic feet of water per second of time flowing in said river, and during all of the time that there is less water flowing in said river than the 1141-6/7 second feet claimed by said Tri-State Land Company

and said The Farmers Mutual Canal Company and in addition thereto 82.57 second feet claimed by Petitioner herein, said defendants will take and divert from said river water which the Petitioner herein is entitled to have flow into its canal, and will, during the greater portion of each irrigation season, take and divert from said river all the water flowing therein and thus prevent the Petitioner herein from diverting any water from said river into its canal to the irreparable damage and injury of the petitioner and the users of water from its canal.

(22) This cross petitioner further avers that in order to determine how much water the defendants Tri-State Land Company, Farmers Mutual Canal Company, Mitchell Irrigation District, The Ramshorn Ditch Company, The Central Irrigation District, The Minatare Mutual Canal & Irrigating Company, The Winters Creek Irrigation District, The Steamboat Ditch Company should permit to flow down the canal of said river to the headgate of this cross petitioner, it will be necessary to determine the quantity of water, if any, that this cross petitioner may be compelled to permit to flow down the channel of said river to the headgates of the canals of other defendants herein and to judicially determine the relative priority of all of the parties to this action.

Wherefore this cross petitioner prays:

(1) That a decree be entered herein determining and adjudicating the respective amounts of water that the respective parties to this action have acquired a right to appropriate from said river and the relative priorities of said rights of appropriation.

(2) That it be adjudged and decreed that this cross-petitioner has acquired a right of appropriation of water from the North Platte River to the extent of 82.57 cubic feet per second of time continuously flowing during each and every irrigation season with a priority dating from the 18th day of April, 1889, and that said right is prior in right and prior in time to that of the Tri-State Land Company

and the other parties to this action and each of them, and that the title to said right of appropriation of this cross-petitioner be quieted and confirmed in this cross petitioner as against the other parties to this action and each of them. That the defendant Tri-State Land Company and all of the other parties to this action taking water from said river above the headgate of this cross-petitioner, and each of them be enjoined and restrained from decreasing or diminishing the flow of water in said river at the head-

gate of the canal of the cross-petitioner herein, below the amount of water which said cross-petitioner has acquired a right to appropriate, to-wit: 82.57 cubic feet per second of time continuously flowing during each and every irrigation season, and the amount of water, if any, which it may be adjudged and decreed that this cross petitioner shall permit to flow down the channel of said river past its headgate, and that the cloud cast on cross petitioner's title by reason of the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board confirming said opinion be removed.

3. That this cross petitioner be granted such other and further relief as may be just and equitable.

4. That this cross-petitioner have and recover judgment for costs of this action.

THE CASTLE ROCK IRRIGATION CANAL
AND WATER COMPANY,

By W. W. WHITE AND
WM. MORROW,

Its Attorneys.

STATE OF NEBRASKA,

Scotts Bluff County, ss:

W. W. White of lawful age, being first duly sworn on his oath, deposes and says: That he is attorney for the Castle Rock Irrigation Canal & Water Power Company a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, that he has read over the foregoing answer and cross-petitioner and knows the contents thereof and that the facts therein stated are true as he verily believes.

W. W. WHITE.

288 Subscribed in my presence and sworn to before me this 23rd day of March, A. D. 1911.

[SEAL.]

M. H. McHENRY,
Clerk of the District Court.

And afterwards, on the 6th day of May 1911, there was filed in the office of said Clerk a stipulation in the words and figures following, to-wit:

In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION COMPANY

vs.

TRI-STATE LAND COMPANY, et al.

It is hereby stipulated between the parties to this case that the answer of the Farmers Mutual Canal Company one of the defendants in this case may be filed herein as of the 4th day of May, 1911. That said answer may be filed as the separate answer of said company or said Company may join with the Tri-State Land Company and

make the answer of said last named Company the joint answer of said two companies, said answer to be interlined to show that it is the joint answer of said two companies.

MORROW & MORKOW,

Attorneys for Plaintiff et al.

W. W. WHITE &

WM. MORROW

Attorneys for Castle Rock I. & W. Power Co.

BELMONT IRRIGATION CANAL & W.

POWER CO.,

ALLIANCE IRRIGATING CANAL CO.,

By G. J. HUNT, *Their Att'y.*

BROWNS CREEK CANAL COMPANY,

By WILCOX & HALLIGAN, *Its Att'ys.*

THE WINTERS CREEK IRRIGATION

COMPANY,

By H. N. HAYNES, *Its Attorney.*

And afterwards on the 22d day of January 1912 the following decree and findings were entered upon the Journal in said cause in words and figures as follows, to-wit:

289 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

TRI STATE COMPANY, FARMERS MUTUAL CANAL COMPANY, THE Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal & Water Power Company, The Minatare Mutual Canal & Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal & Water Power Company, The Chimney Rock Irrigation Canal & Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal & Water Power Company, Thomas A. Wheeler, Charles A. Sweet, William A. Guthrie, a Co-partnership under the firm name of The Lucerne Land Company, Defendants.

January 22nd, 1912.

This cause, having heretofore been submitted to the court on the pleadings herein and the Stipulation of Facts in lieu of the evidence, and the court having heard the argument of counsel and having taken said cause under advisement, and having read the briefs of counsel, and the authorities cited in support thereof, and being now fully advised in the premises doth find:

First. Concerning Tri-State Canal:

(1) That on September 16th, 1887, The Farmers' Canal Company posted on the north bank of the North Platte River, where the head-gate of its canal was later constructed, a notice of its intention to

divert from said river, for irrigation, water sufficient to fill a canal 40 feet wide on the bottom and 4 feet deep, and, on said day, recorded said notice in Cheyenne County, Nebraska; that in March 1888, said Company commenced the construction of its canal from the point where said notice was posted and continued or thereon until about 1890 when said canal extended about 10 miles from the head-
290 gate and the capacity thereof was not to irrigated more than 1,200 acres and not more than 1,500 acres were susceptible of irrigation therefrom.

(2) That on November 17th, 1890, said company posted at the headgates of this canal a second like notice of its intention to appropriate an additional 200,000 miners' inches of water and also specify its intention to construct a canal 80 feet wide on the bottom, to a depth of 8.84 feet, and, on November 18th, 1890 recorded said notice in Scotts Bluff, County, Nebraska.

(3) That in the spring of 1892, said Company resumed work on said canal, constructing a substantial headgate at the point of diversion, 136 feet wide in the clear, costing about \$8000 and continued work only until June 1st, 1893, excavated from its headgate for the first Five Hundred feet 100 feet wide on the bottom for the next four thousand feet 60 feet wide on the bottom; thence to a point nineteen miles below said headgate, 30 feet wide on the bottom; that said canal, as so constructed was of sufficient capacity to irrigate 30,000 acres of land; that the 25 miles of said proposed canal immediately below said 19 miles had been opened up by said Company at various places and nearly one-fourth of the construction work on said 25 miles had been performed in detached portions, unconnected with said upper 19 miles; that \$96,000.00 was the total cost of said canal up to June 1st, 1893, when said Company again ceased work, except that one team continued excavation work until October 1895, when construction work on said canal by said company entirely ceased, that as then constructed, there were 5661.5 acres of land susceptible of irrigation therefrom.

(4) That prior to 1897, not more than 500 acres; prior to 1907 not more than 2000 acres of land had been irrigated from said canal; in 1907 5000 acres; in 1908 7000 acres; in 1909 10,000 acres and in 1910 20,000 acres were irrigated therefrom.

(5) That in 1901, said canal and all property rights, privileges, franchises and immunities of said company were sold under a decree of foreclosure and about February 1904, were acquired by
291 Tri-State Land Company, and in 1909 by Farmer's Mutual Canal Company, in which Tri-State Land Company owns about 55,000 shares and parties under said canal about 25,000 shares of a total of 80,000 shares of the stock of The Farmers Mutual Canal Company.

(6) That in August 1905, Tri-State Land Company began to reconstruct and enlarge said canal and continued to prosecute said largement, so that in the spring of 1907 said canal was constructed to its full size for a distance of 40 miles, and at the close of 1907, 60 miles from the headgate, and was capable of irrigating 60,000 acres of land, and at the close of 1908, 70 miles from the headgate

and was capable of irrigating all the lands described in the opinion of the Secretary of the State Board of Irrigation on the claim of the Farmer's Canal Company, hereinafter referred to; that said company continued work on said canal up to October 31, 1910, the entire expenditure up to said time by said company amounting to \$1,673,321.28.

Second. Concerning The Minatare Canal:

(1) That on January 14th, 1888, The Minatare Canal and Irrigation Company posted a notice at a point on the north bank of the North Platte River, where it later located the headgate of its canal, of its intention to appropriation from said river water sufficient to fill a canal 30 feet wide on the bottom and 2½ feet deep, for irrigation and other useful purposes, and, on said day, said notice was recorded in Scotts Bluff County, Nebraska.

(2) That within 60 days thereafter, said company commenced the construction of a canal from said point of diversion and continued the same until about the 1st of September 1899, at which time said canal was finished and had a capacity sufficient to carry one cubic foot of water per second for each 70 acres of land susceptible of irrigation therefrom.

(3) That in September 1888, water was conducted through said canal from said river to the lands subject to irrigation therefrom, and during said year about 500 acres were irrigated and the amount of land irrigated was increased each year thereafter, so that in the year 1896 2,000 acres and in 1909 9,150 acres between said canal and said river were irrigated therefrom.

(4) That on or about May 16th, 1895, The Minatare Mutual Canal and Irrigation Company acquired said canal and all rights of The Minatare Canal and Irrigation Company and is now the owner of the same.

Third. Concerning The Winters Creek Canal:

(1) That in November 1888 The Winters Creek Irrigation Company completed its survey for a canal to extend in a southeasterly direction 12 miles from the point of diversion on the north bank of the North Platte River.

(2) That on November 15th, 1888 said company began the construction and excavation of said canal and prosecuted the same until it was fully completed to its entire length of 12 miles, and, as so completed, had a capacity sufficient to irrigate all the lands susceptible of irrigation therefrom.

(3) That during each and every year beginning with the Year 1889 and continuing to and including the year 1910, water has been diverted into said canal and used for the irrigation of productive crops, and prior to 1900 5,800 acres of land under said canal had been irrigated and the irrigation area has gradually been increased and now comprises 5,900 acres, and no more water has been diverted since 1900 than before.

Fourth. Concerning The Enterprise Ditch:

(1) That prior to March 28th, 1889, The Enterprise Ditch Company made a survey of a canal in an easterly direction from a point on the north bank of the North Platte River, where it later

located the headgate of its canal, and, on March 28th, 1899, posted a notice at said point, of its intention to divert from said river, water sufficient to fill a ditch 30 feet wide on the bottom and 4 feet deep, to be conducted through said ditch for irrigation and other useful purposes, and, on March 30th, 1889, recorded said notice in Scotts Bluff County, Nebraska.

(2) That within 60 days after the posting of said notice, said company commenced the construction of said canal and prosecuted the same, so that at the close of the year 1890, said canal was 16 feet wide on the bottom at the headgate and carried water 2 feet in depth, with a grade of 3 feet per mile; that said canal was completed to its full capacity prior to the 11th day of April 1895 and when completed, the capacity of said canal was sufficient to carry 1 cubic foot of water for each 70 acres of land lying thereunder.

(3) That in July 1890, said company commenced to conduct water through said canal from said river, for irrigation, and a small amount of land was irrigated from said canal during said year, and the amount of land irrigated therefrom, has been increased each year, so that in 1896, 6,000 acres and in 1909 7,883 acres were irrigated therefrom.

(4) That prior to the commencement of this suit, the Enterprise Ditch Company conveyed said canal, together with all water rights, appropriations and franchises to The Enterprise Irrigation District.

Fifth. Concerning The Castle Rock Canal:

(1) That on April 18th, 1889, the Castle Rock Irrigation Canal and Water Power Company posted a notice at a point on the south bank of the North Platte River, where it later located the headgate of its canal, of its intention to appropriate from said river water sufficient to fill a canal 80 feet wide on the bottom and 2½ feet deep, or in all 29,700 inches of water under a four-inch pressure, for irrigation and other useful purposes.

(2) That shortly after the posting of said notice said company commenced the construction of its canal from said point and prosecuted the same, so that on and prior to the 17th day of July 1896, said canal was 20 feet wide on the bottom at and for some distance below the headgate and gradually decreased in size to 18 feet on the bottom, at which size said canal was continued to a point about 12 miles below the headgate and was constructed so as to carry water to a depth of 2 feet, and was of sufficient capacity to carry 1 second foot of water for each 70 acres of land lying thereunder.

(3) That water was turned into said canal before June 4th, 1893 and a small amount of land irrigated therefrom, during said year; that the amount of land irrigated from said canal had been gradually increased each year thereafter, so that during the year 1896, 2,400 acres, and during the year 1909 5,780 acres of land were irrigated therefrom.

Sixth. Concerning The Belmont Canal:

(1) That on or about the 19th day of December 1889, The Belmont Canal and Water Power Company posted a notice on the south

bank of the North Platte River at a point where it afterwards located the headgate of its canal in Cheyenne County, Nebraska, of its intention to appropriate from said river water sufficient to fill a canal 40 feet wide on the bottom and 4 feet deep for irrigation and other useful purposes, and, on December 23rd, 1889, recorded said notice in Cheyenne County, Nebraska.

(2) That within 60 days after posting said notice, said company commenced the construction of a canal from said point of diversion and prosecuted the same until about the 1st day of December 1892, when said canal was about 40 miles long and 40 feet wide on the bottom at the headgate and had a carrying capacity of about 270 second feet of water.

(3) That on July 7th, 1892, water was turned into said canal from said river and during said year a small amount of land was irrigated therefrom and water was actually conducted to 18,500 acres of land lying under said canal in the year 1894, but 295 since said date, water has not been conducted to all of said 18,500 acres of land each year, but has been used on from 3,000 to 4,000 acres of cultivated land under said ditch each year thereafter, but not the same land each year, and some of said 18,500 acres had not been cultivated or irrigated since 1894, and about 7,000 acres of hay land under said ditch and included in said 18,500 acres has been watered each year since 1894.

Seventh. Concerning The Mitchell Ditch:

(1) That on June 20th, 1890, certain parties, who later incorporated The Mitchell Canal Company, posted on the south bank of the North Platte River, at a point in Laramie County, Wyoming, about one mile west of the Nebraska line, for the use and benefit of The Mitchell Canal and Irrigating Company, a notice of their intention to appropriate 224 cubic feet of water per second of time, sufficient to fill a canal to be constructed from said point 25 feet wide on the bottom, 3 feet deep, with a grade of 1.5 feet per mile, and, on said day, signed and acknowledged Articles of Incorporation of The Mitchell Canal and Irrigating Company, which were filed in the office of the Secretary of State of the State of Nebraska on the 7th day of July 1891, and in the office of the Secretary of State of Wyoming on the 23rd day of August 1890, and ever since said time was a corporation organized and existing under and by virtue of the laws of Nebraska and Wyoming; that a copy of said notice was, on June 25th, 1891, recorded in Laramie County, Wyoming, and said parties made such filing and performed such acts as were required by the State of Wyoming to initiate an appropriation under the laws of said state, but made no filings of any kind in the State of Nebraska.

(2) That shortly after said company commenced the construction of the canal described in the said notice and completed the same in July 1891, when said canal was 25 miles in length, 24½ miles thereof being in the State of Nebraska and all the lands irrigated therefrom being in the state of Nebraska. 296

(3) That in July 1891 water was diverted into said canal in Wyoming and conducted to lands subject to irrigation therefrom in Scotts Bluff County, Nebraska, and a small amount of land irri-

gated therefrom during said year; that the amount of land irrigated by means of said canal had been increased each and every year thereafter until the year 1897, when and since 13,792 acres of land, all lying in the State of Nebraska, have been irrigated therefrom.

(4) That after the application of water to the irrigation of said land and in the year, 1897, said company made out and filed in the office of the State Board of Control of the State of Wyoming, proof of the application of water to said lands, but said Board refused to exercise any jurisdiction with reference thereto, on the ground that said lands were all located in the State of Nebraska, and said Board of Control of the State of Wyoming had no jurisdiction with reference thereto.

(5) That prior to the 15th day of August 1898, The Mitchell Irrigating District acquired said canal and all rights theretofore owned or acquired by The Mitchell Canal and Irrigating Company.

(6) That neither said company nor said district received any notice from the State Board of Irrigation of the State of Nebraska, or its Secretary, of any hearing or proceeding for a determination of the rights acquired by said company, or the rights acquired by any other person, company or corporation, to the use of water of the North Platte River, and neither said company nor said district applied to or filed any claim for the use of water from said river, with the State Board of Irrigation of the State of Nebraska or proof of the application of water to the irrigation of lands, or otherwise, and neither of said parties made any appearance whatsoever at any time or place in any proceedings before said Board, or otherwise, claiming at all times that they were not amenable or subject to the jurisdiction of the State Board of the State of Nebraska.

297 Eighth. Concerning The Central Canal:

(1) That on June 23rd, 1890, the Mutual Irrigation and Water Power Company posted a notice at place of proposed headgate of its canal on the south bank of said river in said Scotts Bluff County, Nebraska, stating its intention there to appropriate and divert from said river water to fill a canal 7 feet wide on the bottom and 3 feet deep, for irrigation purposes, and filed for record in said county a copy thereof.

(2) That within 60 days thereafter said company began construction of its canal and prosecuted said work until July 1st, 1891, when said canal was finished for a length of $4\frac{1}{2}$ miles, with bottom width of 12 feet and grade of 2 feet per mile.

(3) That on July 1st, 1891, said company turned water into said canal from said river to irrigate lands thereunder; that thereafter said canal was conveyed to The Central Irrigation Canal and Water Power Company; that on November 11th, 1891, said company decided to change the location of its headgate, and posted at the new point of diversion notice thereof, and filed for record copy thereof in said Scotts Bluff County.

(4) That within 60 days thereafter, said company began an enlargement of said canal and prosecuted the same to completion, 8 feet deep with bottom width of 50 feet at the headgate, with a grade of 2 feet per mile, with gradually decreasing width to its lower end;

that said canal had capacity of one second foot for each 70 acres irrigable therefrom; that in July 1891, water was diverted thereinto from said river to irrigate lands thereunder; that a small part of said lands was irrigated in 1891; that said irrigable area was increased yearly until 1897, when and thereafter it was 2,537.28 acres, now embraced in the Central Irrigation District, which now owns said canal.

Ninth. Concerning The Chimney Rock Canal:

298 (1) That on June 12th, 1889, The Chimney Rock Irrigation Canal & Water Power Company posted a notice at proposed headgate of its canal on south bank of said river in Cheyenne County, Nebraska, stating its intention there to divert and appropriate for irrigation, water from said river to fill a canal 117 feet in bottom width and 3 feet deep, running southeasterly, and filed for record in said county copy thereof.

(2) That within 60 days thereafter said company commenced construction of said canal and prosecuted the same continuously until June 1895, when said canal had been constructed for a length of $5\frac{7}{8}$ miles from its headgate; that in 1896 said construction work was resumed and continued to completion with a capacity of one second foot of water for each 70 acres irrigable therefrom.

(3) That in June 1891, said company began diversion of water through said canal and irrigated that year about 500 acres thereunder; that the irrigated area thereunder in 1895 was 700 acres, in 1896 about 3,200 acres; it has been increased each year thereafter until 1900, when and since 5,976 acres were irrigated therefrom.

Tenth. Concerning The Alliance Canal:

(1) That on December 26th, 1892, The Alliance Irrigating Canal & Water Power Company posted notice on the north bank of said river at proposed headgate of its canal, stating its intention to divert and appropriate water from said river through a canal to be constructed in a southeasterly direction, and on December 31st, 1892, filed for record in Cheyenne County copy thereof.

(2) That within 60 days thereafter said company began the construction of said canal and pushed the work vigorously, so that on July 17th, 1895, it had completed 9 miles thereof with a capacity of one second foot of water for each 70 acres irrigable therefrom.

299 (3) That water was turned into said canal on May 15th, 1893; that in 1893, 260 acres of tilled crops and about 1,000 acres of meadow, in the year 1894 about 490 acres of tilled crops and 1,200 acres of meadow, in 1895 about 1,000 acres of tilled crops were irrigated therefrom; that water has been used increasingly each year to water lands lying under said ditch, until the year 1909, when about 7,000 acres were irrigated therefrom.

Eleventh. Concerning The Browns Creek Canal:

(1) That on June 25th, 1891, The Browns Creek Irrigation Company posted a notice at place of proposed headgate of its canal on the north bank of said river, stating its intention to divert 10,000 inches of water under a four inch pressure and on July 6, 1891, recorded said notice in Cheyenne County, Nebraska.

(2) That in August, 1891, construction work was commenced on

said canal and continuously prosecuted, until the same was finished in 1905, and as finished it was 50 feet wide on the bottom at the headgate and gradually decreased in size to the terminus thereof.

(3) That land has been irrigated from said canal from year to year and the acreage increased until the year 1910, when 9,500 acres were irrigated therefrom.

Twelfth. Concerning The Ramshorn Ditch:

(1) That on March 24th, 1893, the predecessors of The Ramshorn Ditch Company posted at place of proposed headgate of Ramshorn Ditch on the north bank of said river in Scotts Bluff County, Nebraska, a notice stating their intention to appropriate from said river water sufficient to fill a canal 16 feet wide on the bottom and 5 feet deep at the headgate, for irrigation purposes, and recorded copy of said notice in said county.

(2) That on April 1st, 1893, said parties commenced the construction of said canal and prosecuted the same continuously until April 1st, 1894, when same was completed for a length of $6\frac{1}{2}$ miles, with a capacity sufficient to carry one second foot of water for each 70 acres irrigable therefrom.

300 (3) That thereafter said parties conveyed said canal, together with all rights acquired by them, to The Ramshorn Ditch Company which now owns the same.

(4) That water was conducted through said canal from the North Platte River in increasing quantities from year to year, so that in 1894, about 300 acres and in 1895 about 800 acres, in 1896 1,500 acres and in 1904, 2,340 acres of land have been irrigated therefrom.

Thirteenth. Concerning The Nine Mile Canal:

(1) That on November, 1890, The Bayard Irrigation Canal & Water Power Company posted a notice at place of subsequent construction of headgate of its canal on the north bank of said river stating its intention to appropriate from said river, water sufficient to fill a canal $42\frac{1}{2}$ feet wide on bottom and 2 feet deep, for irrigation, power and other useful purposes, and recorded copy of said notice in Scotts Bluff County on December 6th, 1890.

(2) That within 60 days thereafter said company began construction of its canal from said stated place and prosecuted work thereon continuously until the summer of 1891; that work thereon was resumed in August 1893, by its grantee, The Nine Mile Canal and Reservoir Company, which was prosecuted until 1895, when the first 12 miles of said canal was completed; that on December 6th, 1893 said The Nine Mile Canal and Reservoir Company posted at said point of diversion notice of its intention to appropriate 240 second feet of water for irrigation purposes, and caused copy thereof to be recorded in Scotts Bluff County; that said canal was finished by said company in 1898; that when finished said canal was 21 miles long, 20 feet wide on the bottom immediately below the headgate, with grade of 2 feet per mile, and of capacity sufficient to carry one second foot of water for each 70 acres irrigable therefrom.

301 (3) That thereafter said canal and water rights were acquired by The Nine Mile Irrigation District, defendant herein; that in 1895 water was conducted through said canal from

said river to irrigate about 1,300 acres of land; that the irrigable area thereunder was increased to about 1,800 acres in 1896; yearly thereafter until the commencement of this suit, when it was 5,908 acres.

Fourteenth. Concerning The Steamboat Ditch:

(1) That on October 22nd, 1895, The Steamboat Ditch Company made application to the State Board of Irrigation, for a permit to appropriate 35 second feet of water from said river to irrigate land described therein, lying between its proposed ditch and The Castle Rock Canal, viz: 750 acres; that said application was granted, subject to certain conditions duly performed.

(2) That said company in due time began construction of its canal in May 1896, and duly completed the same, so that when completed, said canal was 20 feet wide on the bottom with a capacity of 1 second foot of water for each 70 acres irrigable therefrom; that water was conducted through said canal to irrigate about 300 acres of land in 1896, since which time the irrigated area thereunder has been increased yearly until 1901, when it was and since has been 830 acres; that on July 14th, 1903, the Steamboat Ditch Company made proof on a blank provided therefor by the State Board of Irrigation, showing the irrigation of said 830 acres of land and filed the same in the office of said Board on July 17th, 1903.

Fifteenth. Concerning The Gering Ditch:

(1) That on March 15th, 1897, The Gering Irrigation District made application to the State Board of Irrigation for a permit to appropriate 550 second feet of water from said river to irrigate lands in said district; that said application was allowed by said Board, subject to certain conditions, duly performed.

302 (2) That said District in due time commenced and completed the construction of its ditch, so that when completed it was about 50 miles long and of a capacity sufficient to carry one second foot of water for each 70 acres in said district.

(3) That upon the completion of said canal, water was conducted through the same to irrigate the lands in said district; that in 1900 a portion of said lands were irrigated and the irrigable area thereunder was increased each year until 1905, when and since all of the land in said district, viz: 14,621.24 acres has been irrigated.

(4) That on October 27th, 1905, The Gering Irrigation District made proof of its application of water to all of said land and filed the same with the State Board of Irrigation; that on November 2nd, 1907, said Board issued a certificate of appropriation of water to The Gering Irrigation District for said 14,621.24 acres of land, limiting the amount of water to 1/70 of a cubic foot per second of time for each acre of said land.

Sixteenth. Concerning The Relative Locations of Said Canals:

(1) That the Mitchell Canal heads in the State of Wyoming, about 1 mile west of the Nebraska line: The Gering Canal in Scotts Bluff County, Nebraska about 1 mile below The Mitchell Canal; The Tri-State Canal in said county about 1/4 mile below The Gering Canal The Ramshorn Ditch in said County about 3 miles below the Tri-State Canal; The Enterprise Ditch in said County about 5 miles

below the Ramshorn Ditch; The Winters Creek Ditch in said county about 12 miles below the Enterprise Ditch; The Central Ditch in said county about 3 miles below The Winters Creek Ditch; The Minatare Ditch in said county about 6 miles below the Central Ditch; The Steamboat Ditch in said county about 1½ miles below the Minatare Ditch; The Castle Rock Ditch in said county about 1½ miles below the Steamboat Ditch; The Nine Mile Canal in said county about 5 miles below the Castle Rock Ditch; The Chimney Rock Canal in said county about 8 miles below the Nine Mile Canal; The 303 Alliance Canal in Cheyenne County, now Morrill County, Nebraska, about 2 miles below the Chimney Rock Canal; The Belmont Canal in said county about 6 miles below The Alliance Canal; The Browns Creek Canal in said county about 8 miles below the Belmont Canal.

Seventeenth. Concerning Proceedings before the State Board of Irrigation.

(1) That on May 31st, 1895, transcripts of the various notices of appropriation above mentioned were filed with the Secretary of the State Board of Irrigation and thereafter said Secretary forwarded to each of the various claimants named in said notices, a form of claim for the waters of the State of Nebraska, with blanks in each to be filled out, giving the information therein required.

(2) That said blank forms were filled out and returned to the office of said Secretary by the parties to this action as follows:

By Browns Creek Irrigation Canal Company on June 24th, 1895; by The Chimney Rock Irrigation Canal & Water Power Company on June 28th, 1895; by The Castle Rock Irrigation Canal & Water Power Company on July 5th, 1895; by The Alliance Irrigation Canal & Water Power Company on July 17th, 1895; by The Nine Mile Canal & Reservoir Company on August 12th, 1895; by The Central Irrigation Canal & Water Power Company on August 13th, 1895; by The Winters Creek Irrigation Company on September 20th, 1895; by The Belmont Irrigation Canal & Water Power Company on September 30th, 1895; by The Ramshorn Ditch Company on October 6th, 1895; by The Enterprise Ditch Company on October 15th, 1895; by The Minatare Mutual Canal & Irrigating Company on July 17th, 1896.

(3) That on June 5th, 1896, said Secretary mailed a copy of the rules of said Board and a notice to each party to this action, except The Mitchell Irrigation District and its predecessor in interest, reciting "that the hearing in the matter of adjudicating rights to the use of water claimed prior to April 4th, 1895, within the watershed of the North Platte and Platte Rivers, will be held for 304 the several counties therein, by an officer of the State Board of Irrigation at the places and upon the dated indicated, as follows: For Cheyenne and Banner Counties in Bayard on Tuesday and Wednesday July 14 and 15, 1896; For Scotts Bluff and Sioux Counties in Gering on Friday July 17, 1896, at office of O. W. Gardner.

Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing

the necessary proofs, if any be required, to sustain their claims: otherwise said claims will be dismissed."

(4) That no other notice was forwarded by said Board, or its Secretary, or any officer, agent or clerk thereof, to any of the parties to this action.

(5) That the Secretary of said Board appeared at the times and places specified in said notice to make inquiry and take evidence regarding said claims and others, and, on July 14, 1896, heard evidence offered on behalf of The Chimney Rock Irrigation Canal & Water Power Company, The Nine Mile Canal and Reservoir Company, predecessor of The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, and Charles E. Logan; that on said day the claim of The Belmont Irrigation Canal and Water Power Company was submitted without and evidence; that on July 17th 1896, said Secretary received evidence severally offered on behalf of Yorrick Nichols and Carrol Nichols, predecessors of The Ramshorn Ditch Company, The Winters Creek Irrigation Company, The Enterprise Ditch Company, predecessor of The Enterprise Irrigation District, The Castle Rock Irrigation Canal & Water Power Company, The Minatare Mutual Canal & Irrigating Company, The Central Irrigation Canal & Water Power Company, predecessor of The Central Irrigation District and The Farmer's Manal Company, predecessor of The Farmers Mutual Canal Company.

(6) That all of the evidence submitted at said hearing was reduced to writing and preserved in the office of the Secretary
305 of the State Board of Irrigation; that on said hearings, The Farmer's Canal Company had not filed any claim and was given 30 days within which to do so, but did not file its claim within said granted time; that the evidence submitted in its behalf tended to prove that 19 miles and no more of said canal had been completed only to size heretofore stated: also that not more than 500 acres of land had been irrigated from said canal.

(7) That on September 19th. 1896. The Farmer's Canal Company, by Wm. H. Wright, its President, filed with the Secretary of said Board its claim, partially filling out the blank form; that therein was stated location of headgate of its canal, its length as 81 miles, the sections it was said to traverse with reference to accompanying plats showing its line, qualified with specific averments as follows:

"That the portion of said ditch 19 miles in length indicated on said plats by a black line is completed one-half size; that the portion of said ditch or canal 62 miles in length indicated on said plat by a red line is not completed": that in said claim the total canal excavation was stated to be 3,125,000 cubic yards and total length of fluming about 150 feet, followed by this averment, viz:

"That the material thus far removed amounts to about 600,000 cubic yards";

That the estimated cost of said ditch was said to be 350,000 and expenditures so far incurred \$98,000; that said printed form of claim was left blank and without information on following topics:

(a) When actual construction work began.

(b) Then, if ever, water had been turned into said ditch.

(c) What acreage, if any, had ever been irrigated therefrom, that in said claim the following statement was made:

"That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated is five years from April 4th, 1895."

306 (8) That no order was made continuing said hearings of

July 14, 15, 16 and 17, 1896 to any later date; and no notice was given, that said claims, or any of them, would again be considered or heard by said Board, its Secretary, or any other officer; that no other hearing on any of said claims was ever held, except those of the Steamboat, Castle Rock, Belmont and Alliances ditches; that concerning said four claims hearings, without notice to others, were held subsequent to April 7th, 1897.

(9) That on January 7th, 1897, the Secretary of said Board filed and entered of record in his office, an opinion concerning said claim of the Farmer's Canal Company, wherein he stated that its priority of appropriation dates from September, 16th, 1887; that its ditch is about 81 miles in length and covers and reclaims the 80,000 acres therein described; that said claim is allowed on condition that the water shall be used for irrigation, that the time to complete its application to the beneficial use indicated shall extend to September 1st, 1904, that the amount of the appropriation shall not exceed 1142-6/7 second feet, nor the capacity of the canal, nor the least amount necessary to produce crops under good husbandry, and that said appropriation shall be limited to 1/70 of one second foot for each acre irrigated by September 1st, 1904.

(10) That at the times hereinafter stated, the Secretary of said Board filed in his office a separate opinion in the matter of each of the following claims:

January 7th, 1897, The Enterprise Ditch, stating the date of priority as March 28, 1889, the land re-claimed as 12,160 acres and limiting the time for applying water to said land to September 1, 1900.

January 7th, 1897, The Minatare Ditch, stating the date of priority as January 14th, 1889, the land re-claimed as 17,460 acres and limiting the time for applying water to said land to September 1, 1899.

307 January 7th, 1897, The Castle Rock Canal, stating the date of priority as April 18, 1889, the land re-claimed as 5,780 acres, and limiting the time for applying water to said land to September 1, 1897.

January 7th, 1897, The Central Canal, stating the date of priority as June 23rd, 1890, the land re-claimed as 2,500 acres and limiting the time for applying water to said lands to September 1, 1900.

January 8th, 1897, The Nine Mile Canal, stating the date of priority as December 6th, 1893, the land re-claimed as 14,000 acres and limiting the time for applying water to said land to September 1, 1897.

January 13th, 1897, The Winters Creek Canal, stating the date

of priority as October 18, 1888, the land re-claimed as 8,700 acres and limiting the time for applying water to said land to September 1, 1899.

January 26, 1897, The Ramshorn Ditch, stating the date of priority as March 20, 1893, the land re-claimed as 3,200 acres and limiting the time for applying water to said land to September 1st, 1899.

January 28th, 1897, The Browns Creek Canal, stating the date of priority as January 20th, 1892, the land reclaimed as 13,000 acres and limiting the time for applying water to said land to September 1, 1902..

August 10th, 1898, The Belmont Canal, stating the date of priority as December 19th, 1889, the land re-claimed as 35,000 acres and limiting the time for applying water to said land to September 1, 1900.

August 12th, 1898, The Alliance Canal, stating the date of priority as December 26th, 1892, the land reclaimed as 7,000 acres and limiting the time for applying water to said land to September 1, 1900.

September 13th, 1898, The Chimney Rock Canal, stating the date of priority as December 3rd, 1890, the land reclaimed as 6,750 acres and limiting the time for applying water to said land to September 1, 1899.

(11) That on April 7, 1897, said Board, without notice to or knowledge of any of the parties to this action, entered of record a resolution affirming all of the foregoing opinions filed prior to said date, and on January 2, 1899, another resolution affirming all of said opinions filed subsequent to April 7, 1897, and prior to January 2nd, 1899.

(12) That immediately after the filing of each of said opinions by said Secretary, he forwarded a copy thereof to the claimant named therein, but no copy or notice thereof was at any time forwarded to any other claimant; that no notice of either resolution above mention-, was ever given to any of said claimants and no party to this action acquired any knowledge thereof, or of any opinion so filed by said secretary regarding any claim, except its own, for several years after the filing of said opinions and the entering of said resolutions.

(13) That on the 27th day of December, 1905, the Tri-State Land Company secured a copy of the opinion of the Secretary of the State Board of Irrigation with reference to its claim and on said date caused it to be filed with the County Clerk of Scotts Bluff County and duly recorded.

(14) That no certificate as required by statute in that behalf was by said board, through its secretary, or otherwise, within thirty days or at any time after the passage of said resolution-, or either thereof, issued or recorded to inform any claimant of the number of its, his or their priority or the amount of prior appropriations from said river.

(15) That the above mentioned opinions and resolutions constitute the only action taken by said board or its secretary concerning said claims.

Eighteenth. Concerning flow of river and distribution of water:

(1) That the average flow of the North Platte River from July 15th to November 1st, each year, at the headgate of the Tri-State Canal does not exceed 800 second feet and frequently runs as low as 300 second feet; that without diversion from said river at or below said point, the flow of said river would not be materially changed until it reached a point below the headgate of the lowest canal on said stream involved in this action.

(2) That during a portion of the irrigation season between July 15th and November 1st, 1910, the owner of the Tri-State Canal diverted all of the water flowing in said river at the headgate of its canal and thereby prevented some of the other parties to this action from obtaining any water from said river and the remainder of said parties from obtaining a sufficient amount to irrigate the growing crops on lands under their respective ditches, which they otherwise would have obtained.

(3) That the State Board of Irrigation attempted to distribute the water of said river in accordance with the opinions of its secretary, and on July 21, 1910, closed the headgates of all canals involved in this action, except the Tri-State Canal and Mitchell Canal, for the purpose of causing water to flow down through the headgate of the canal of an alleged prior appropriator and kept some of said headgates closed for several weeks, and the remainder thereof closed during the balance of said irrigation season, during all of which time it permitted the owner of Tri-State Canal to divert into said Canal such portion of 1142-6/7 second feet as was needed for the irrigation of lands lying under said Tri-State Canal, not to exceed 1/70 of one second feet for each acre irrigated.

(4) That unless otherwise provided by a decree of this court, said State Board will permit the owner of said Tri-State Canal to divert from said river during each irrigation season, so much of the 1142 6/7 second feet of water as it may find necessary for the irrigation of lands under said canal, even though said diversion consumes all of the water flowing in said river and deprives the other parties to this action from the use of any water.

Nineteenth. The Court finds generally the issues joined herein for the plaintiff and the respective cross-petitioners and against the Tri-State Land Company and the Farmers Mutual Canal Company, in so far as this finding is not inconsistent with any of the special findings above mentioned.

The Court finds as conclusions of law:

(1) That because the canal of the Mitchell Irrigation District heads in the State of Wyoming and said District diverts water into its canal in said State, this Court has no jurisdiction of the subject matter of its cross-petition.

(2) That the proceedings of the State Board of Irrigation and its secretary in the matter of claims for appropriations made or initiated prior to April 4th, 1895, by the parties to this action, or any of them, do not constitute a valid binding adjudication of the rights acquired by said parties.

(3) That said Farmers Canal Company constructed its canal to

a capacity sufficient to irrigate 2,000 acres of land and applied water to said land with such diligence as to entitle it and its successors to a priority from September 16th, 1887, the date of posting its notice, for a sufficient amount of water to irrigate 2,000 acres, nor exceeding 28.57 second feet; that said Farmers Canal Company and its successors failed to complete its canal and to apply water to the irrigation of lands in excess of 2,000 acres with sufficient diligence to entitle said canal to any priority and dating the actual application of water to lands in excess of 2,000 acres, and the priority of all appropriations acquired by the Farmers Canal Company and its successors in excess of the priority for said 2,000 acres are subsequent, junior and inferior to the priority of other parties to this action.

311 (4) That if any appropriation or appropriations in excess of, or addition to said appropriation for 2,000 acres were ever acquired by said Farmers Canal Company, or its successors, with a priority dating from September 16th, 1887, such appropriation or appropriations have become lost by a failure to apply the same to any beneficial use for a continuous period of more than ten years.

(5) That the Minatare Mutual Canal and Irrigation Company and its predecessor constructed the Minatare Canal to a capacity sufficient to irrigate the lands lying under it and applied water to 9,150 acres with such diligence as to entitle said canal to a priority from January 14th, 1888, for a sufficient amount of water to irrigate said 9,150 acres, not to exceed 130-5/7 second feet.

(6) That the Winters Creek Irrigation Company constructed its canal to a capacity sufficient to irrigate the land lying under it and applied water to 5,900 acres with such diligence as to entitle it to a priority dating from October 1st, 1888, for a sufficient amount of water to irrigate said 5,900 acres, not to exceed 84 2/7 second feet.

(7) That The Enterprise Ditch Company and its successor constructed its canal to a capacity sufficient to irrigate the land lying under it and applied water to 7,883 acres, with sufficient diligence to entitle it to a priority dating from March 28, 1889, for said 7,883 acres, not to exceed 112.61 second feet.

(8) That The Castle Rock Irrigation Canal & Water Power Company constructed its canal to a capacity sufficient to irrigate the land lying thereunder and applied water to 5,780 acres with sufficient diligence to entitle it to a priority dating from April 18, 1889, for a sufficient amount of water to irrigate said 5,780 acres, not to exceed 82 4/7 second feet.

(9) That the Chimney Rock Irrigation Canal & Water Power Company constructed its canal to a capacity sufficient to irrigate the lands lying thereunder and applied water to 5,976 acres
312 with sufficient diligence to entitle it to a priority dating from June 12, 1889, for a sufficient amount of water to irrigate said 5,976 acres, not to exceed 85.37 second feet.

(10) That the Belmont Canal & Water Power Company constructed its canal to a capacity sufficient to carry 270 second feet of water and applied water to the irrigation of 18,500 acres, with sufficient diligence to entitle it to a priority dating from December

19, 1889, for a sufficient amount of water to irrigate said 18,500 acres, not to exceed $264 \frac{2}{7}$ second feet.

(11) That the predecessors of The Central Irrigation District constructed the canal now owned by said district to a capacity sufficient to irrigate all the lands thereunder and applied water to the irrigation of 2,537.28 acres with sufficient diligence to entitle said canal to a priority dating from June 23, 1890, for a sufficient amount of water to irrigate said 2,537.28 acres, not to exceed 36.24 second feet.

(12) That the predecessors of The Nine Mile Irrigation District constructed the canal now owned by said District to a capacity sufficient to irrigate all the land thereunder and applied water to the irrigation of 5,906 acres with sufficient diligence to entitle said canal to a priority dating from November 28, 1890, for water sufficient to irrigate said 5,906 acres, not to exceed $84\text{-}26/70$ second feet.

(13) That The Browns Creek Irrigation Creek Company constructed its canal to a capacity to irrigate the land lying thereunder and applied water to the irrigation of 9,500 acres, with such diligence as to entitle it to a priority dating from June 25, 1891 for water sufficient to irrigate said 9,500 acres, not to exceed $135\text{-}5/7$ second feet.

(14) That the predecessor of The Ramshorn Ditch Company constructed the canal of said company to a capacity sufficient to irrigate the land thereunder and applied water to the irrigation of 2,340 acres, with sufficient diligence to entitle said canal to a priority dating from March 24, 1892, for a sufficient amount of water to irrigate said 2,340 acres, not to exceed $33\text{-}3/7$ second feet.

(15) That The Alliance Irrigating Canal & Water Power Company constructed the canal of said company to a capacity sufficient to irrigate the land lying thereunder and applied water to the irrigation of 7,000 acres, with sufficient diligence to entitle the said canal to a priority dating from December 26th, 1892, for water sufficient to irrigate said 7,000 acres, not to exceed 100 second feet.

(16) That The Steamboat Ditch Company has acquired a priority dating from October 22nd, 1895, for a sufficient amount of water to irrigate 830 acres, not to exceed $11\text{-}6/7$ second feet.

(17) That The Gering Irrigation District has acquired a priority dating from March 15, 1897, for a sufficient amount of water to irrigate 14,621.24 acres, not to exceed 208.87 second feet.

It is therefore considered, adjudged and decreed by the Court:

(1) That the cross petition of the Mitchell Irrigation District be and the same is hereby dismissed without prejudice for want of jurisdiction over the subject matter thereof.

(2) That said Farmers Mutual Canal Company, owner of the Tri-State Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 2,000 acres of land thereunder, not to exceed however, $28 \frac{5}{7}$ second feet continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 2,000

acres in the exercise of good husbandry, which said appropriation dated from September 16th, 1887, and the title of said Company thereto is good and valid and is hereby quieted and confirmed in said company and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

314 (3) That the Minatare Mutual Canal & Irrigation Company owner of the Minatare Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 9,150 acres of land thereunder, not to exceed, however, 130-5/7 second feet continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 9,150 acres in the exercise of good husbandry which said appropriation dated from January 15th, 1888, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(4) That the Winters Creek Irrigation Company, owner of the Winter Creek Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 5,900 acres of land, not to exceed, however, 84-2/7 second feet continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 5,900 acres in the exercise of good husbandry, which said appropriation dated from October 1, 1888, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said company and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

315 (5) That The Enterprise Irrigation District, owner of the Enterprise Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 7,883 acres of land, not to exceed, however, 112-43/70 second feet continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 7,833 acres in the exercise of good husbandry, which said appropriation dated from March 28, 1889, and the title of said district thereto is good and valid and is hereby quieted and confirmed in said district and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(6) That the Castle Rock Irrigation Canal & Water Power Company, owner of the Castle Rock Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate, 5,780 acres of land, not to exceed, however, 82-4/7 second feet, continually flow-

ing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 5,780 acres in the exercise of good husbandry, which said appropriation dates from April 18th, 1889, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(7) That The Chimney Rock Irrigation Canal & Water Power Company, owner of the Chimney Rock Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 5,976 acres of land, not to exceed, however, 85.37 second feet continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 5,976 acres in the exercise of good husbandry, which
316 said appropriation dates from June 12th, 1889, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(8) That The Belmont Canal and Water Power Company, owner of the Belmont Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 18,500 acres of land, not to exceed, however 264-2/7 second feet continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 18,500 acres in the exercise of good husbandry, which said appropriation dates from December 19th, 1889, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(9) That The Central Irrigation District, owner of the Central Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 2,537.28 acres of land, not to exceed 36.24 second feet, continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 2,537.28 acres in the exercise of good husbandry, which said appropriation dates from June 23rd, 1890, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

317 (10) That The Nine Mile Irrigation District, owner of The Nine Mile Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 5,906 acres of land, not to exceed however, 82-26/70 second feet, continually flowing during each irri-

gation season; nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 5,906 acres in the exercise of good husbandry, which said appropriation dates from November 28th, 1890, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said District and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(11) That The Browns Creek Irrigation Company, owner of the Browns Creek Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 9,500 acres of land, not to exceed, however, 135-5/7 second feet, continually flowing during each irrigation season; nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 9,500 acres in the exercise of good husbandry, which said appropriation dated from June 25th, 1891, and the title of said company thereto is good and valid and is hereby quieted and confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(12) That The Ramshorn Ditch Company, owner of the Ramshorn Ditch, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 8,340 acres of land, not to exceed, however, 33-3/7 second feet, continually flowing during each irrigation season nor the least amount that experience may hereafter indicate 318 as necessary for the production of crops on said 8,340 acres in the exercise of good husbandry, which said appropriation dates from March 24, 1892, and the title of said company thereto is good and valid and is hereby confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(13) That The Alliance Irrigating Canal & Water Power Company, owner of the Alliance Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 7,000 acres of land, not to exceed, however, 100 second feet, continually flowing during each irrigation season; nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 7,000 acres in the exercise of good husbandry, which said appropriation dates from December 26th, 1892, and the title of said district thereto is good and valid and is hereby confirmed in said district, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

(14) That The Steamboat Ditch Company, owner of the Steamboat Ditch, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 830 acres of land, not to exceed, however, 11-6/7 second feet, continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary

for the production of crops on said 830 acres in the exercise of good husbandry, which said appropriation dates from October 22nd, 1895, and the title of said company thereto is good and valid and is hereby confirmed in said company, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

319 (15) That the Gering Irrigation District, owner of the Gering Canal, and the users of water therefrom, have an appropriation for a sufficient amount of water to be diverted from said river into said canal to irrigate 14,621.24 acres of land, not to exceed, however, 208.87 second feet, continually flowing during each irrigation season, nor the least amount that experience may hereafter indicate as necessary for the production of crops on said 14,621.24 acres in the exercise of good husbandry, which said appropriation dates from March 15th, 1897, and the title of said district thereto is good and valid and is hereby confirmed in said district, and all other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent herewith.

(16) That when the flow of water in said river in the State of Nebraska, is insufficient to supply all the parties to this action with the respective amounts of water to which they are entitled under the provisions of this decree, and other prior appropriators, if any there be, the water of said stream shall be distributed in accordance with the respective priorities of said parties, as herein found and determined; that is to say, the earliest appropriator herein shall receive the full amount of water herein decreed to it, and no more, the next in order of priority, the full amount decreed to it, and no more, and so on until the entire supply of water in said river not needed by prior appropriators, if any there be, is exhausted, and each and all of the parties hereto, their agents, servants and employees, are hereby perpetually enjoined and restrained from doing any act of thing to interfere with said order of distribution.

(17) That each of the parties herein pay its own costs.

The Tri-State Land Company and Farmers Mutual Canal Company each excepts to each and every finding of fact and conclusion of law, above mentioned, and to every provision and paragraph hereof following the words: "It is therefore considered, adjudged and decreed by the Court," except paragraph 1, relating to the dismissal of the cross-petition of the Mitchell Irrigation District.

The Mitchell Irrigation District excepts to the conclusion of law that the Court has no jurisdiction to quiet the title of its appropriation and to the provision of this decree dismissing its cross petition.

Supersedeas Bond fixed at \$500.00, and forty days from the rising of the Court allowed the defendants Tri-State Land Company and Farmers Mutual Canal Company and the Mitchell Irrigation District for preparing and presenting bill of exceptions.

By the Court:

R. W. HOBART, *Judge*.

And afterwards on the 25th day of January 1912, there was filed in the office of said Clerk a Motion for a New Trial in the words and figures following, to-wit:

In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

VS.

THE TRI-STATE LAND COMPANY, FARMERS MUTUAL CANAL COMPANY, and THE MITCHELL IRRIGATION DISTRICT et al., Defendant.

Motion for New Trial.

Comes now the defendants, Tri-State Land Company and Farmers Mutual Canal Company and moves the Court for a new trial in this case and allege the following grounds therefor;

321 (1) The Court erred in setting aside and holding void the adjudication of the State Board of Irrigation in its several orders made adjudicating the rights of the several parties to this action to the waters from the North Platte River.

(2) The Court erred in holding that the adjudication made by the State Board of Irrigation to the several parties, plaintiff and defendants in this action, to waters from the North Platte River was illegal and void.

(3) The Court erred in not holding that the several orders and findings of the State Board of Irrigation appropriating the waters of the North Platte River to the several parties to this action and the several findings of said board as to the rights of the parties to this action and the priority of their rights to water from the North Platte River was not a valid adjudication, and binding on the several parties to this action and on the court.

(4) The Court erred in holding that it had original jurisdiction to determine the rights of the several parties to this action to the waters of the North Platte River and to the priorities of the several parties in and to the waters of said river.

(5) The Court erred in not dismissing the action on the ground that it had no jurisdiction of the subject matter of the action.

(6) The Court erred in not dismissing the action on the ground that it had no original jurisdiction to adjudicate the rights of the several parties to this action to the waters of the North Platte River or to apportion the waters of said river among them.

(7) The Court erred in assuming original jurisdiction to determine the rights of the several parties hereto to the waters of the North Platte River and fixing the priority of the several parties hereto in and to said waters in the absence of all other parties claiming a right to take water from said river for irrigation purposes.

322 (8) The Court erred in finding facts contrary to the admissions made in the pleadings of the several parties.

(9) The judgment and decree of the court is not sustained by any competent evidence.

(10) The findings of the court are not sustained by any competent evidence.

(11) The findings and decree of the court are contrary to the stipulations of facts made by the parties.

(12) The judgment and decree of the court are contrary in law.

(13) Errors of law occurring at the trial and objected to at the time.

TRI-STATE LAND COMPANY &
FARMERS MUTUAL CANAL COMPANY,
C. C. FLANSBURG &

By WRIGHT & DUFFIE,

*Att'ys for Tri-State Land Company
and Farmers Mutual Canal Company.*

And afterwards on the 3rd day of February, 1912, there was filed in the office of the Clerk of the District Court and Appeal Bond of the Tri-State Land Company and the Farmers Mutual Canal Company in words and figures following, to-wit;

Know all men by these presents: That we, Tri-State Land Company and the Farmers Mutual Canal Company as principals and Cullen N. Wright as surety are held and firmly bound unto The Enterprise District and to other parties to an action hereinafter designated in the penal sum of Five Hundred Dollars of the lawful money of the United States for the payment of which well and truly to be made we bind ourselves, our heirs, executors, successors and assigns, jointly, severally and firmly by these presents. The conditions of the above obligation are such that,

323 Whereas, the said Enterprise Irrigation District has heretofore commenced an action in the District Court of Scotts Bluff County, Nebraska, against the above bounded Tri-State Land Company and Farmers Mutual Canal Company and numerous other parties and

Whereas, the defendants in said action other than the Tri-State Land Company and the Farmers Mutual Canal Company filed cross-bills asking relief as against said Tri-State Land Company and the Farmers Mutual Canal Company and

Whereas, on the 22nd day of January, 1912, the Court entered a decree in said action appropriating to the several parties certain waters of the North Platte River as water rights vested in said parties as of date in said decree set forth and

Whereas, the above bounden Tri-State Land Company and Farmers Mutual Canal Company have appealed from said decree

Now therefore if the said appellants shall prosecute and appeal with all due diligence and abide by and perform the judgment and decree of the Supreme Court entered upon said appeal then the above bounden obligation shall be void otherwise to remain in full force and effect.

Witness our hands this 3rd day of February, A. D. 1913.

TRI-STATE LAND COMPANY,
FARMERS MUTUAL CANAL COMPANY,
By WRIGHT & DUFFIE, *Their Att'ys.*
C. N. WRIGHT.

The above bond and surety thereon approved by me this 3rd day of February, 1912.

M. H. McHENRY,
Clerk of the District Court.

O. K.

WM. MORROW.

324 STATE OF NEBRASKA,
Scotts Bluff County, ss:

I, M. H. McHenry, Clerk of the District Court in and for said County, do hereby certify that the foregoing transcript is a true and correct copy of the Pleadings and Journal Entries of Record, to-wit:

Answer and Cross Petition of the Belmont Irrigating Canal and Water Power Company

Amended and supplemental Petition of the Enterprise Irrigation District.

Amended Answer and Cross Petition of the Alliance Irrigating Canal and Water Power Company,

Answer and Amended and Supplemental Cross Petition of the Gering Irrigation District.

Answer and Amended and Supplemental Cross Petition of the Central Irrigation District.

Amended and Supplemental Cross Petition of the Ramshorn Ditch Company.

Answer and Cross Petition of the Browns Creek Irrigation Co.

Answer and Amended and Supplemental Cross Petition of the Minatare Mutual Canal and Irrigating Company.

Separate Answer of the Tri-State Land Company to the Amended and Supplemental Petition of Plaintiff in which Farmers Mutual Canal Company joins.

Answer and Amended and Supplemental Cross Petition of the Nine Mile Irrigation District.

Answer and Cross Petition of Winters Creek Irrigation Co.

Answer and Amended and Supplemental Cross Petition of the Chimney Rock Irrigation Canal and Water Power Company.

Plaintiff's Reply to the answer of the Tri-State Land Co.

Answer and Amended and Supplemental Cross Petition of the Mitchell Irrigation District.

325 Amended Answer and Amended and Supplemental Cross Petition of the Steamboat Ditch Company.

Separate Answer and Cross Petition of the Castle Rock Irrigation Canal and Water Power Company.

Stipulation.

Decree.

Motion for New Trial.

Appeal Bond.

In the cause wherein the Enterprise Irrigation District was plaintiff and the Tri-State Land Company, The Farmers Mutual Canal Company and the Several Cross Petitioners were defendants.

And I further certify that the Bill of Exceptions signed and settled on the 7th day of March, 1912, and hereto attached is the original Bill of Exceptions in said cause.

In testimony whereof I have subscribed my name and affixed the seal of the District Court this 7th day of March, 1912.

[SEAL.]

M. H. McHENRY,
Clerk of the District Court.

Endorsed: 17,522. The Enterprise Irrigation Dist., v. Tri-State Land Co., Transcript Vol. 1. Supreme Court of Nebraska. Filed Mar. 12 1912. H. C. Lindsay, Clerk.

326 And on the same day there was filed in the office of the clerk of said supreme court a certain Bill of Exceptions, in the words and figures following, to-wit:

327 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,

vs.

TRI-STATE LAND COMPANY, FARMERS MUTUAL CANAL COMPANY, Mitchell Irrigation District, Ramshorn Ditch Company, Gering Irrigation District, Winters Creek Irrigation Company, Central Irrigation District, Castle Rock Irrigation Canal and Water Power Company, Minatare Mutual Canal and Irrigating Company, Steamboat Ditch Company, Nine Mile Irrigation District, Alliance Irrigating Canal and Water Power Company, Chimney Rock Irrigation Canal and Water Power Company, Browns Creek Irrigation Company, Charles E. Logan, Belmont Irrigation Canal and Water Power Company; Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Copartnership under the Firm Name of The Lucerne Land Company, Defendants.

Appearances:

For The Enterprise Irrigation District, Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Minatare Mutual Canal & Irrigating Company, The Steamboat Ditch Company, the Nine Mile Irrigation District, and The Chimney Rock Irrigation Canal & Water Power Company, Morrow & Morrow.

For the Winters Creek Irrigation Company, H. N. Haynes.

For the Castle Rock Irrigation Canal & Water Power Company, W. W. White & Wm. Morrow.

For The Alliance Irrigation Canal & Water Power Company, and the Belmont Irrigation Canal & Water Power Company, G. J. Hunt.

For The Browns Creek Irrigation Company, Wilcox & Halligan.

For the Tri-State Land Company, and Farmers Mutual Canal Company, Wright & Duffie and C. C. Flansburg.

Bill of Exceptions.

Be it remembered that heretofore, to wit: on the trial of this case, the respective parties hereto, to maintain the several and respective

issues on their several and respective parts, offered as the evidence in the case, and the sole evidence, a stipulation of facts upon which said cause should be heard, a copy of which stipulation is in the words and figures following:

328 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,
VS.
TRI-STATE LAND COMPANY et al., Defendants.

Stipulation of Facts.

It is hereby stipulated and agreed, for the purposes of this case only, that the following may be considered as established facts on the trial of said cause, in so far as the same may be material, each and every party to this action reserving the right to object to the materiality of any fact herein agreed to. Subject to the foregoing reservation, the following facts are to be considered as established on the trial of said cause, to wit:

First. That prior to the time the lands under the various ditches hereinafter described were irrigated, they were, on account of insufficient moisture and rainfall, semi-desert in character, and without irrigation the raising of crops is uncertain, precarious and unprofitable, but by the application of water by means of irrigation they are capable of producing large and valuable crops; that all of said lands are in the valley of the North Platte river; that the bed of said river is sand; that said river derives its main supply of water from various streams heading in the mountains of Wyoming, and that the amount of water flowing between the banks and in the bed of said river varies greatly at different times in the year; that during the months of April, May, and June, the amount of such water usually flowing in said river has been sufficient to supply all the canals thus far constructed from said river for irrigating and other purposes; that there are no tributaries to said river between the headgate of the canal of
329 of the canals mentioned or described in this action; that if no water were diverted from said river at the headgate of the Tri-State Land Company, or at any point below said headgate, the quantity of water flowing in said stream would not be materially increased or diminished when it reached the point of the location of the headgate of the lowest canal diverting water from said stream, hereinafter described.

Second. That on the 31st day of August, 1887, The Farmers' Canal Company was duly incorporated under the laws of the state of Nebraska, for the construction and operation of canals for irrigation and other useful purposes, and ever since said time has been and now is a corporation; that on the 16th day of September, 1887, the company prepared a notice of its intention to divert from the North Platte river for the purpose of irrigation, a quantity of water suffi-

cient to fill a canal forty (40) feet wide on the bottom and carry water to a depth of four (4) feet, and posted the same at the point on said river where the west line of Section Ten (10), Township Twenty-three (23) North, Range Fifty-eight (58) West of the Sixth Principal Meridian, intersects the north bank of said river, and on the same day said notice was duly filed and recorded in the office of the county clerk of Cheyenne County, Nebraska, which at that time included the territory now embraces in Scotts Bluff County; that on or about the month of March, 1888, said The Farmers' Canal Company commenced the construction of its canal for the purpose of diverting water from the North Platte River at the point indicated in said notice, and continued work on said canal until about the year 1890, at which time said canal was constructed in an easterly direction from the said point of diversion for a distance of about ten miles; that at said time said ditch was about twelve (12) feet wide on the bottom just below the headgate and the first mile thereof was in the neighborhood of six feet deep and was capable of carrying water to a depth of two feet; that at said time there was not more than fifteen hundred (1,500) acres of land susceptible of irrigation from said canal as then constructed, and the capacity of said canal was not sufficient to carry water for more than from one thousand (1,000) to Twelve hundred (1,200) acres of land.

Third. That on or about the 17th day of November, 1890, said company prepared and posted at the headgate of its said canal a second notice of its intention to appropriate and claim for said company the use of water from said river in addition to its former claim, to the amount of two hundred thousand (200,000) miner's or statutory inches, (a miner's or statutory inch being the amount or volume of water that will flow continually through an orifice one inch square and a partition one inch thick, under a four inch pressure) said appropriation being for irrigation, manufacturing, domestic and other useful purposes. Said notice also specified that the canal or ditch for conducting said water shall be eighty (80) feet wide on the bottom with a slope of one to one and with a depth of 8.84 feet at the point of divergence, and with an average grade of not greater than two feet per mile; that on or about the 18th day of November, 1890, said notice was filed and recorded in the office of the county clerk of Scotts Bluff County, Nebraska.

Fourth. That in the year 1891, The Farmers' Canal Company, for the purpose of procuring money to continue work on said canal, authorized the issue of \$250,000.00 in bonds, the same to be secured by deed of trust, and did issue certain bonds, and, for the purpose of securing the payment thereof, executed its trust deed on the canal, water rights, privileges, franchises, immunities, and all other rights and properties of said company, and sold about \$80,000.00 face value of said bonds; that in the spring of 1892, said company resumed work on said canal with the proceeds of said bonds so sold, and constructed a substantial headgate at the point of diversion, one hundred and thirty-six (136) feet in width in the clear, at a cost of about \$8,000.00, and excavated its canal to

a width of about one hundred (100) feet for the first five hundred (500) feet immediately below said headgate; and from a point five hundred (500) feet below said headgate to a point about 4,500 feet below said headgate, excavated said canal to a width of sixty (60) feet on the bottom; that from said point (about 4,500 feet below the headgate of said canal) to a point about nineteen (19) miles below said headgate of said canal, said canal was excavated to a width of about thirty (30) feet on the bottom, and water was conducted from two feet per mile for the first mile, thence seven-tenths feet per mile was capable of carrying water to a depth of six feet, and was of sufficient capacity to irrigate thirty thousand (30,000) acres of land; that the twenty-five (25) miles of said canal immediately below the nineteen miles above mentioned had been opened up by said Farmers' Canal Company at various places to the full depth thereof, and nearly one-fourth of the construction work in said twenty-five miles had been performed in detached portions, but had not been connected up with said nineteen miles of canal in which water was flowing, and all of said work was accomplished by June 1st, 1893, at a total expenditure of about \$96,000.00, when said company again ceased work on said canal because of its inability to sell any more bonds or procure funds to prosecute said work; and discharged all workmen engaged thereon, except one team which continued excavation work until October, 1895; that from the time said company ceased work on said canal in 1895, no further construction work was done on said canal by said company, and that as then constructed, there were 5,661.5 acres of land susceptible of irrigation

332 from said canal, and other lands lying under the Enterprise and Ramshorn ditches to the amount of 2,540 acres which were also susceptible of irrigation from the Farmers' Canal, had not the Enterprise and Ramshorn been built to irrigate such lands. That prior to the year 1897, not more than five hundred (500) acres of land had been irrigated annually from said canal, as appears from the evidence taken on July 17th, 1896, before the State Board of Irrigation (hereinafter recited and set out); that prior to the year 1907 not more than 2,000 acres had been irrigated therefrom, and in the year 1907, five thousand acres were irrigated, and during the year 1908, seven thousand acres were irrigated; and in the year 1909, ten thousand acres and in the year 1910, twenty thousand acres, were irrigated from said canal.

After the Farmers' Canal Company suspended work, it employed a superintendent and kept said canal in repair until the year 1898, after which certain persons owning water rights in said canal and other land owners under the line thereof, continued to irrigate their land therefrom, and with the consent of said The Farmers' Canal Company and its successors to keep said canal in repair, and did, under such consent, keep said canal in repair until the Tri-State Land Company took possession thereof; with the exception that in the year 1897, the river commenced to cut the banks thereof from and around the headgate, and it became necessary to protect the same, at which time said The Farmers' Canal Company employed and paid a superintendent to see that said banks were properly pro-

ected and said headgate properly preserved, and who, in fact, employed men and did work on said headgate at that time.

That after work on said Farmers' Canal ceased in 1893, said Farmers' Canal Company, by and through its officers, endeavored to sell its bonds (secured by the trust deed aforesaid) to various parties, and failing so to do, endeavored to exchange such bonds with different contractors to complete said canal, which negotiations continued until after the foreclosure of said trust deed hereinafter referred to.

The Minatare Canal.

Fifth. That on or about the 14th day of January, 1888, The Minatare Canal & Irrigation Company, a corporation organized and existing under and by virtue of the laws of the state of Nebraska, posted a notice at a point on the north bank of the North Platte River, about thirty (30) miles below the headgate of The Farmers' Canal Company, in Section Thirty-two (32), Township Twenty-two (22) North, Range Fifty-four (54) West of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, of its intention to divert and appropriate a sufficient quantity of water from said river at said point to fill a canal thirty (30) feet wide on the bottom and two and a half feet deep, said water to be conducted in an easterly direction down the valley of the North Platte river for irrigation and other useful and beneficial purposes; which said notice was, on the 14th day of January, 1888, filed in the office of the county clerk and recorder of Scotts Bluff County, Nebraska, and recorded in Miscellaneous Records No. 1, at Page 7 of the records of said office.

Sixth. That within 60 days after the posting of said notice above mentioned, said The Minatare Canal & Irrigation Company commenced the construction of a canal from said point of diversion, and continued the prosecution of the same until about the first day of September, 1899, at which time said canal was finished. That said canal extends in an easterly direction from the point of diversion through said Section Thirty-two (32), Section Thirty-three (33), and to a line between the Southwest and Southeast quarters of

Section Thirty-four (34), at which point said canal divides into two branches; the north branch thereof extends northeast from said point of division to the northeast corner of Section Thirty-four thence southeast through Sections Thirty-five and Thirty-six, Township Twenty-two (22) North, Range Fifty-four (54) West, and through Sections Six, Five, Four, Three, Ten, Eleven, Two and One, Township Twenty-one (21) North, Range Fifty-three (53) west. That the south branch of said canal extends in an easterly direction from said point of diversion through Sections thirty-four and Thirty-five, Township Twenty-two (22) North, Range Fifty-four (54) west, and through Sections Six, Seven, Eighteen, Seventeen, Sixteen, Twenty-two, Twenty-four and Twenty-three of Township Twenty-one (21) North, Range Fifty-four (54) West of the Sixth Principal Meridian. That the headgate of said canal was, when said canal was finished, and still is sixty (60) feet

wide on the bottom, and said ditch immediately below the headgate is sixty (60) feet wide on the bottom. That from a point one-fourth of a mile below the headgate of said ditch to the point where it divides into two branches, it is about thirty (30) feet wide on the bottom. That the south branch of said ditch is about twenty (20) feet wide on the bottom from the point where it divides into two branches and gradually narrows to ten (10) feet wide at the terminus thereof. That the north branch of said ditch is about ten (10) feet wide on the bottom from the point of division for a distance of two or three miles below said point, from whence it gradually narrows to about seven and a half ($7\frac{1}{2}$) feet on the bottom at the terminus thereof. That the grade of said canal is about $1\frac{1}{8}$ feet per mile, and said canal has a capacity sufficient to carry one cubic foot of water per second for each seventy acres of land susceptible of irrigation therefrom.

335 Seventh. That on or about the 21st day of September, 1888, water was conducted through said canal from the North Platte River to the lands subject to irrigation therefrom, said lands being the place of intended use of said water. That about five hundred acres of land were irrigated through and by means of said canal during said year and the amount of land irrigated therefrom was increased each year thereafter until the year 1896, when two thousand acres of land had been irrigated, and the amount of land irrigated was increased each year thereafter until 1909, when 9,150 acres of land between said canal and said river subject to irrigation from said canal were watered therefrom.

Eighth. That on or about the 16th day of May, 1895, the Minatare Canal & Irrigation Company sold, assigned, transferred and set over said canal and the right of appropriation acquired by it to The Minatare Mutual Canal & Irrigating Company, a corporation organized under the laws of the State of Nebraska, which has ever since been and which now is the owner of the same.

Winter's Creek Canal.

Ninth. That on, to-wit, the 1st day of October, 1888, The Winter's Creek Irrigation Company was duly incorporated under the laws of the State of Nebraska, and ever since said time has been and now is a corporation. That on or about November 1st, 1888, it completed its survey for a canal to extend in a Southeasterly direction twelve miles, and on November 15th, 1888, began the construction and excavation of said Winter's Creek Canal the point of diversion from said river and the headgate of said canal being located at a point on the north bank of the North Platte River in what is now Scotts Bluff County, then Cheyenne County, Nebraska, in the Northwest Quarter of the Southeast Quarter (N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of Section Seventeen (17), Township Twenty-two (22) North, Range Fifty-five (55) West of the Sixth Principal Meridian. That work was prosecuted on said canal until it was fully completed to its entire length of

336 twelve miles, and of dimensions as follows:

At headgate forty (40) feet wide on bottom 5.5 feet deep;

at 3/10 of a mile below headgate twenty-four (24) feet wide on bottom three (3) feet deep, and so continues to one mile below headgate without diverting any water therefrom; at one mile below headgate twenty-four (24) feet wide on bottom three (3) feet deep; at six (6) miles below headgate twenty (20) feet wide on bottom 2.5 feet deep; at 7.5 miles below headgate sixteen (16) feet wide on bottom and 2.5 feet deep; at nine (9) miles below headgate eight (8) feet wide on bottom and 2.5 feet deep; at twelve (12) miles eight (8) feet wide on bottom and 2.5 feet deep.

That prior to the irrigation season of 1889, the construction of said canal was only about ten miles in length and with a width on the bottom of ten feet, but prior to the first day of May, 1890, it was enlarged and extended so as to be of dimensions stated in its Statement of Claim to the waters of the State of Nebraska, a copy of which is recited and set out herein; that for each and every year beginning with the year 1889, and continuing to and including the year 1910, water has been diverted into said canal and used for the irrigation of productive crops on lands lying under its line; that prior to the year 1900, 5,800 acres of land under the line of said canal had been irrigated. The irrigation area has gradually been increased and now comprises 5,900 acres, and no more water has been diverted since 1900 than before.

Enterprise Ditch.

Tenth. That at all times hereinafter mentioned The Enterprise Ditch Company was a corporation organized and existing under and by virtue of the laws of the State of Nebraska.

Eleventh. That prior to the 28th day of March, 1889, The Enterprise Ditch Company made a survey of a canal in an easterly direction, from a point on the north bank of the North Platte River about 40 rods south and 500 feet west of the Northeast Corner of the

337 Northeast Quarter (N. E. $\frac{1}{4}$) of Section Twenty-eight (28), Township Twenty-three (23) north, Range Fifty-seven (57)

West of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, for the irrigation of certain lands lying between said canal and said river; that on or about the 28th day of March 1889, said Company posted a notice at said point on the north bank of the North Platte River in Scotts Bluff County, Nebraska, of its intention to divert a sufficient supply of water from the North Platte River at said point to fill a ditch 30 feet wide on the bottom and 4 feet deep; said water to be conducted through said ditch in an easterly direction down the valley of the North Platte River, and used for irrigating, milling manufacturing, domestic and other useful purposes, and on the 30th day of March, 1889, said notice was filed in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in Book A of Irrigation Records at page 64.

Twelfth. That within 60 days after the posting of said notice at said point of diversion said Company commenced the construction of said canal and prosecuted the same, so that at the close of the

year 1890, said ditch was 16 feet wide at the headgate and carried water two (2) feet in depth with a grade at and immediately below the headgate of three (3) feet per mile.

Thirteenth. That thereafter said Company decided to change the point of diversion of its said canal from the North Platte River and to enlarge the same so as to carry an additional amount of water, and on the 14th day of August 1893, it caused another notice of intention to appropriate 13,000 inches of water, measured under four inch pressure, in addition to that previously appropriated, to be posted at the point on the North bank of the North Platte River at which it intended thereafter to divert water from said river; which said point is located in Section Twenty-seven (27), Township

Twenty-three (23) North, Range Fifty-seven (57) West of the Sixth Principal Meridian, South $66^{\circ} 50'$ east 1,662 feet from the northwest corner of said Section Twenty-seven (27) and north $74^{\circ} 18'$ east 1,685 feet from the original headgate of said canal. That said notice was, on or about the 18th day of August 1893, filed in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in Volume "A" of Irrigation Records at Page 167.

Fourteenth. That immediately after the posting of said last mentioned notice said company commenced the construction of its headgate at the new point of diversion, and its canal therefrom, and the enlargement of the canal previously constructed, and continued work thereon until finished; that after the completion of the same and to-wit, on or about the 20th day of April, 1895, said company posted at the new headgate a notice of its intention to change the point of diversion of the water previously appropriated to the new headgate with a priority dating from the date of posting the original notice above mentioned which said notice was filed for record in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in said office on or about the 20th day of April A. 1895.

Fifteenth. That said canal was completed to its full capacity prior to the 11th day of April 1895, to-wit, immediately below the headgate 6.4 feet deep, 40 feet wide on the bottom 52.8 feet wide on top, with a grade of 3 feet per mile and carried water three (3) feet deep for the first mile; at one mile below the headgate 5 feet deep, 20 feet wide on the bottom and carried water four (4) feet deep at 7.61 miles below the headgate 4 feet deep, 18 feet wide on the bottom, 26 feet wide on top, with a grade of 2 feet per mile; 12.18 miles below the headgate 3 feet deep; 14 feet wide on the bottom, 20 feet wide with a grade of 2.11 feet per mile; at 17.1 miles below the headgate 3.3 feet, 10 feet wide on the bottom,

339 tom, 16.6 feet wide on top, with a grade of 2.11 feet per mile at 20 miles below the headgate 2.8 feet deep, 6 feet wide on the bottom, 11.6 feet wide on top, with a grade of 2.11 feet per mile and passing through the following described lands, to-wit: Sections 27, 22, 23, 14, 13, 24, Township 23 North, Range 57 West of the Sixth Principal Meridian; Sections 19, 20, 21, 22, 27, 26, 35, 36 township 23 North, Range 56 West of the Sixth Principal Meridian

Sections 31, 32, 33, Township 23 North, Range 55 West of the 6th P. M., Sections 6, 5, 4, 9, 10, 11, 14, 13, township 22 North, Range 54 West of the Sixth Principal Meridian. That the capacity of said canal is sufficient to carry one cubic foot of water per second for each seventy acres susceptible of irrigation therefrom.

Sixteenth. That in July 1890, said The Enterprise Ditch Company commenced to conduct water through its said canal from the North Platte River for the irrigation of the land subject to irrigation therefrom, said land being the place of intended use of said water; that a small amount of land was irrigated from said canal during said year, and during each and every year thereafter the amount of water conducted through said canal by said company and the amount of land irrigated therefrom had been increased until the year 1896, when 6,000 acres were irrigated therefrom, all of which have been irrigated from said canal during each and every year subsequent to the year 1896, and the irrigation area under said canal had been increased each year thereafter until the year 1909, when 7,883 acres of land were irrigated therefrom.

The Castle Rock Canal.

Seventeenth. That on or about the 18th day of April, 1889, The Castle Rock Irrigation Canal & Water Power Company, a corporation, organized and existing under and by virtue of the laws of the State of Nebraska, posted a notice at a point on the south bank of the North Platte River in Lot four (4) Section Four (4), Township Twenty-one (21) North, Range Fifty-four (54) West of the 340 Sixth Principal Meridian, in Cheyenne County, Nebraska, about 30 miles below the headgate of The Farmers Canal Company, of its intention to divert and appropriate from said river a sufficient quantity of water to fill a ditch or canal 80 feet wide at the bottom and 85 feet at the top and 2½ feet deep, or in all 29,700 inches of water under a four-inch pressure, for irrigation, water power and water works to be carried or conducted in a canal bearing in a southeasterly direction, and terminating in the Vicinity of sections one and twelve, township 20 North, Range 52 West of the Sixth Principal Meridian, which said notice was, on or about the 25th day of April 1889, filed for record in the office of the County Clerk of Scotts Bluff County, Nebraska, and recorded in Volume A of Irrigation Records on page 67.

Eighteenth. That shortly after the posting of said notice above mentioned, said The Castle Rock Irrigation Canal & Water Power Company commenced the construction of the canal from said point of diversion and prosecuted the same so that on and prior to the 17th day of July 1896, said canal was 20 feet wide on the bottom at the headgate thereof and for some distance below the headgate, and gradually decreases in size to 18 feet on the bottom at which size said canal was continued to a point about 12 miles below the headgate; that said canal was constructed so as to carry water to a depth of two (2) feet; that said canal extended in a southeasterly direction from the point of divergence above mentioned, through sections 4,

10, 14, and 24 of township 21 North, range 54 west of the Sixth Principal Meridian, and through portions of sections 19 and 30 and across section 29, and a corner of section 28, to a point just south of the middle of the North line of section 33 in Township 21 North, Range 53 West of the Sixth Principal Meridian, at which point said canal divides into two branches, the south branch thereof extending in a southeasterly direction, through the Northeast Quarter (N. E. $\frac{1}{4}$) of said Section Thirty-three (33) and through the South Half (S. $\frac{1}{2}$) of Section 34 of Township 21 North, Range 53 West of the Sixth Principal Meridian, and through Sections, 4, 9, a corner of Section 10, through Sections 15, 14 and a corner of Section 11, Township 20 North, Range 53 West of the Sixth Principal Meridian, which said branch was 10 feet in width; that the north branch extends from said point in Section 33, Township 21 North, Range 53 West in an easterly direction through said Section 33, and through Sections 34, 35 and 36 of said township; and also through a corner of Section 3, and through Section 2, and terminating in Section one of Township 20 North, Range 53 West of the Sixth Principal Meridian, which said branch is eight (8) feet wide on the bottom; that the grade of said canal ranges from one foot per mile to five feet per mile.

Nineteenth. That water was turned into said ditch or canal on or before the 4th day of June 1893; that a small portion of the land lying under said canal was irrigated therefrom during said year; that the amount of land irrigated from said canal has been gradually increased each year thereafter so that during the year 1896, 1,240 acres of said land had been irrigated from said canal; so that during the year 1909 about 5,780 acres of land were irrigated therefrom.

The Belmont Canal.

Twentieth. That on or about the 19th day of December 1889, The Belmont Canal & Water Power Company, a corporation duly organized and existing under the laws of the State of Nebraska, posted a notice at a point on the south bank of the North Platte River in the Southeast Quarter of the Southwest Quarter (S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$) of Section 18, township 20 North, Range 51 West 342 of the 6th P. M., in Cheyenne County, Nebraska, of its intention to divert and appropriate a sufficient quantity of water from said river at said point to fill a canal 40 feet wide on the bottom, and 4 feet deep, said water to be conducted in an easterly direction down the valley of said river for the purpose of agriculture, horticulture, manufacturing, domestic and other useful purposes, which notice was on the 23d day of December, 1889, filed in the office of the County Clerk of Cheyenne County, Nebraska, and duly recorded therein.

Twenty-first. That within sixty (60) days after posting said notice the said Belmont Irrigating Canal & Water Power Company commenced the construction of a canal from said point of diversion and prosecuted the same until about the first day of December 1892, at which time said canal was about 40 miles in length, passing

through the following described lands; Sections 18, 19, 20, 21, 28, 27, 26, 25 and 36, Township 20 North, Range 51 West; Sections 31, Township 20 North, Range 50 West; Sections 6, 5, 8, 9, 10, 15, 14, 23, and 24, Township 19 North, Range 50 West; Sections 19, 21, 28, 27, 34, 35 and 36, Township 19 North, Range 49 West; Section 1, Township 18, North, Range 49 West; Sections 6, 5, 8, 9, 16, 15, 22, 23 and 24 in Township 18 North, Range 48 West; Sections 19, 20, 29, 28, 27, 34, 26 and 25 in township 18 North, Range 47 West.

That said canal at the headgate was, in the year 1897, 40 feet wide on the bottom; at one mile below the headgate is 22 feet wide on the bottom; 4 miles below said headgate is 20 feet wide on the bottom; and eight miles below said headgate 18 feet wide on the bottom; at 16 miles below said headgate, 16 feet wide on the bottom; at 22 miles below said headgate, 14 feet wide on the bottom; at 28 miles below said headgate, 12 feet wide on the bottom, and at 32 miles below said headgate, to the end of said canal 10 feet wide on the bottom; and that the grade of said canal is 2.64 feet per mile. That said canal as then constructed had a carrying capacity of about 270 cubic feet per second.

343 That the headgate of said Canal is 40 feet wide in the clear and said canal as now constructed is of similar width for one mile from said gate, there it narrows to thirty feet and continues that width for three miles when it narrows to 26 feet which width it maintains from there to Pumpkinseed Creek a point 15 miles from its head; from Pumpkin Creek to Deep Holes Creek, a distance of eight miles its bottom width is 20 feet; from Deep Holes to a point five miles below it is 18 feet and from that point to Cedar Creek—five miles more—it is 16 feet; from Cedar Creek to a point four miles east it is gradually narrowed to 8 feet during the next three miles it narrows to five feet and maintains that width one mile further to its terminus; the Canal is on a grade of 2.64 per mile and has a slope of one and a half to one.

That on or about the 7th day of July 1892, water was turned into said canal from the North Platte River and was taken through said canal to the lands lying thereunder; and that during said year a small amount of land was irrigated therefrom, and water was actually conducted to 18,500 acres of said land lying under said ditch in the year 1894; but since said date water has not been conducted to all of said 18,500 acres of land each year, but has been used on from 3,000 to 4,000 acres of cultivated land under said ditch each year thereafter, but not the same land each year; and some of said 18,500 acres has not been cultivated or irrigated since 1894. And about 7,000 acres of hay land under said ditch, and included in said 18,500 acres has been watered each year since 1894.

The Mitchell Ditch.

21½. That on the 20th day of June 1890, John R. Stilts, Perry Brazil, George W. Hale, Robert T. Neeley and Harry Haig executed and acknowledged Articles of Incorporation of the Mitchell Canal & Irrigating Company, for the purpose of constructing, owning, and

operating a canal for irrigation and other useful purposes; that on the 7th day of July 1890, said Articles of Incorporation were
 344 filed in the office of the Secretary of State of the State of Nebraska, and in the office of the County Clerk of Scotts Bluff County, Nebraska, and ever since said time said Mitchell Canal & Irrigating Company has been and now is a corporation, organized and existing under and by virtue of the laws of the state of Nebraska; that on the 23d day of August 1890, said Articles of Incorporation were filed in the office of the Secretary of State of the State of Wyoming and ever since said Mitchell Canal & Irrigating Company has been and now is a corporation, organized and existing under and by virtue of the laws of the state of Wyoming.

That on the said 20th day of June 1890 said incorporators, to-wit, John R. Stilts, Perry Brazil, George W. Hale, Robert T. Neeley and Harry Haig caused a notice to be posted on the south bank of the North Platte River at a point in Laramie County, Wyoming, about one mile west of the Nebraska line, and on the 25th day of June 1890 filed a copy of said notice for record in the office of the Clerk and ex officio register of deeds of Laramie County, Wyoming; that said notice was posted and filed as aforesaid for the use and benefit of the Mitchell Canal & Irrigating Company, incorporated by said parties, and said notice was in words and figures following, to-wit:

Notice of Appropriation of Water from North Platte River.

No. 19813.

TERRITORY OF WYOMING,

County of Laramie, ss:

This Instrument was filed for record on the 25th day of June A. D. 1890, at 4 o'clock P. M., and is duly recorded in book 49, on page 234.

IRA L. FREDENDALL,

County Clerk and ex-Officio Register of Deeds.

345

Notice.

To whom it may concern:

Know all men by these presents that the Mitchell Irrigation and Canal Company, a duly incorporated Corporation, incorporated for the purpose of construction an irrigating canal and for the purpose of selling water and water rights for irrigating, manufacturing and beneficial purposes by its President, John R. Stilts, who is duly authorized by said Company to appropriate water of sufficient amount to supply and fill said canal, do hereby claim and appropriate from the unclaimed water flowing in the North Platte River, to the amount of 224 cubic feet per second of time or more definitely explained a sufficient amount of water to fill a canal 25 feet wide on the bottom, three feet deep on the grade of 1.5 feet per mile, said

water to be received through an opening into said river, thence through headgates into flume, thence into said canal, to be distributed along said line of canal.

JOHN R. STILTS,
President of Mitchell Canal and Irrigation Company.

TER. OF WYOMING,
Laramie Co., ss:

I, John R. Stilts, being duly sworn on oath, say that I am the duly elected President of the Mitchell Irrigation Company, and that I did post a true copy of this notice up at the point of diversion the 20th day of June 1890, upon a board so that all passers-by could plainly observe it, also a copy of Claim to Water Right hereunto attached.

JOHN R. STILTS, *President.*

Subscribed and sworn to this 25th day of June 1890.

[SEAL.]

SAM'L ATKINSON,
Dep. Co. Cl'k.

346 That on or about the 25th day of June 1890 said John R. Stilts, Perry Brazil, George W. Hale, Robert T. Neeley and Harry Haig filed in the office of the clerk and ex-officio register of deeds and also in the office of the clerk of the District Court of Laramie County, Wyoming, for the use and benefit of the Mitchell Canal & Irrigating Company, incorporated by said parties, a statement, which statement is in words and figures following, to-wit:

*Statement of Claim to Water Right of the Mitchell Irrigation Ditch
by John R. Stilts et al.*

19814. 109.

TERRITORY OF WYOMING,
County of Laramie, ss:

I, John R. Stilts, President of the Mitchell Irrigating and Canal Co., being duly sworn according to law, on my oath say:

1. The name of the ditch for which an appropriation of water is claimed is the Mitchell Irrigating ditch.

2. The name- and owners of the said ditch is John R. Stilts, Perry Brazil, George W. Hale, Robert F. Neeley and Harry Haig and Post Office address is Mitchell, Nebraska.

3. Said ditch is situated in Water District No. one, in the County of Laramie in the Territory of Wyoming.

4. The headgate is located of following from the quarter section corner between sections nine (9) and ten (10) in Township twenty-three (23) north, Range sixty west (60) in Laramie County, Wyoming, running thence 67° 30' E. distance 2,859 feet, thence N. 55° 15' E. distance 563 feet to point of diversion.

5. Said ditch draws its supply of water from said North Platte River.
- 347 6. The length of said ditch is twenty-five miles and one half.
7. The width of said ditch is twenty-five feet (25) on the bottom with banks of a slope of one to one foot at the bottom.
8. The depth of the ditch is three feet.
9. The grade of the said ditch is one and five tenths (1.5) feet per mile.
10. The carrying capacity of the said ditch is 224 cubic feet per second of time.
11. Work was commenced on said ditch by original construction, on June 16th, 1890.
12. Water was actually appropriated therefrom for irrigation and beneficial purposes on the 20th day of June 1890.
13. There are 44,800 acres of land under the said ditch and being proposed to be irrigated therefrom.
14. A map on a scale of one inch to the mile, showing the location and course of said ditch, the natural stream from which it draws its supply therefrom, also the legal sub-divisions of land through which it flows, is found hereto attached and is made part of statement of claim.
15. The owners are constructing the same for irrigation and other beneficial purposes, intending to use and appropriate water from said North Platte River, for such purposes; and this statement of claim is made for such purposes of complying with the provisions of an Act of Council and Representatives of the Territory of Wyoming, entitled: "An act creating the office of Territorial Engineer, and concerning the appropriation of water," approved March 8, 1888.

JOHN R. STILTS,

President Mitchell Irrigating Ditch Company.

TERRITORY OF WYOMING,

County of Laramie, ss:

348 I hereby certify that the foregoing Statement of Claim was signed in my presence and sworn to before me by ——— this 25th day of June, A. D. 1890.

[SEAL.]

SAM'L ATKINSON,
Dep. Co. Clk.

TERRITORY OF WYOMING,

County of Laramie, ss:

This Instrument was filed for record at 4 o'clock in the afternoon, on the 25th day of June, A. D. 1890, and duly recorded in Book 67 of — on page- 109, 110.

IRA L. FREDENDALL,
County Clerk and Ex-officio Register of Deeds.

That the ditch mentioned in said notice and statement was intended to irrigate land located between said ditch and the North Platte river in Scotts Bluff County, Nebraska, but no copy of said

notice or statement, nor was any notice of the intention of said parties, or of the Mitchell Canal & Irrigating Company to appropriate from the North Platte river water to be used in irrigating lands in Scotts Bluff County, Nebraska, ever filed in the office of the County Clerk of said County.

That section 1343 of the Revised Statutes of Wyoming of 1887, which said section of the statute was in force and effect at all times above mentioned, is in words and figures following, to-wit:

"Hereafter every person, company or corporation, constructing, enlarging or extending any ditch, canal or reservoir for beneficial purposes, and intending to use or appropriate any water from any natural stream within a water district for such beneficial purposes, shall file with the clerk and ex-officio register of deeds and the clerk of the district court, of the proper county, before the commencement of the construction, enlargement or extension of such ditch,

349 canal or reservoir, a statement, showing the stream or streams from which the water is to be taken; the point or place on said stream at or near which the water is to be taken out; the line of said ditch or ditches, as near as may be, the use or uses to which said water is intended to be applied; the dimensions of such ditch or ditches and each, thereof, giving width on bottom and top, slope of banks, and grade of ditches, and likewise of any enlargements thereof; which statement shall be filed and indexed as is provided in section 1340, and from the time of filing any such statement, water sufficient to fill said ditch or ditches and to serve the uses aforesaid, if a lawful and just use, shall be deemed and adjudged to be appropriated: Provided, That nothing herein contained shall be permitted to interfere with a prior right to said water or to any thereof; and provided further, That such person or persons or corporation shall, within sixty days next ensuing the filing of such statement, begin the actual construction of said ditch or ditches and shall prosecute the work of the construction thereof diligently and continuously to its completion, and Provided further, The beginning of all necessary surveys of such ditch or ditches be construed as the beginning of said work of construction.

That on the 18th day of August, 1890, the Mitchell Canal & Irrigating Company commenced the construction of the canal mentioned and described in the above mentioned notice and statement and continued work thereon until the month of July 1891, at which time said canal was finished to its present terminus, a point about twenty-five miles southeast of said point of diversion; that the dimensions of said canal at the headgate were as follows: 75 feet wide and 10 feet deep; that below said headgate said canal is of the uniform width of thirty-five feet on the bottom, with a carrying capacity of 350 240 cubic feet per second of time; that said canal passes through the following described land, to-wit: Sections 9, 15, 22, 23, 26, 25, township twenty-three (23) north, range fifty-eight (58) west; sections 31, 32, 33, 34, 35 and 36, all in township twenty-three (23) north, range fifty-sever (57); sections 31 and 32, township twenty-three (23) north, range fifty-six (56); sections 5, 8, 9,

15, 14, 23, 24, 25, 30 and to the middle of section 29, all in township twenty-two (22) north, range fifty-six (56).

That in July 1891 water was conducted through said canal from the North Platte river to lands subject to irrigation therefrom, in Scotts Bluff County, Nebraska, said lands being the place of intended use of said water, and a small portion of said lands was irrigated from said canal during said year; that the amount of land irrigated by means of said canal has been increased each and every year thereafter until the year 1897, when and since 13,792 acres of land have been irrigated therefrom.

That after the application of water to the irrigation of said land, and in the year 1897, said the Mitchell Canal & Irrigating Company made out and filed in the office of the State Board of Control of the State of Wyoming, proof of the application of water to said land through and by means of said canal, but said State Board of Control refused to take any action whatever thereon, or to assume or exercise any jurisdiction with reference thereto on the ground that said lands were all located in the state of Nebraska, and that said State Board of Control of the State of Wyoming had no jurisdiction with reference thereto.

That prior to the 15th day of August, 1898, the Mitchell Irrigation District, defendant in this case, was organized and incorporated under the provision of an act of the legislature of the State of Nebraska, providing for the organization, etc., of irrigation districts.

351 Approved March 26, 1895; that shortly thereafter the Mitchell Canal & Irrigating Company sold, assigned, and transferred all its right, title and interest in and to said canal, together with all rights of appropriation of water and all franchises, easements and property acquired by it, to the Mitchell Irrigation District, who is now and ever since said time has been the owner of the same; that neither the Mitchell Canal & Irrigating Company or the Mitchell Irrigation District received any notice whatever from the State Board of Irrigation of the State of Nebraska, or its Secretary, or any officer thereof, of any hearing or proceeding for a determination of the rights acquired by said Mitchell Irrigation District, or the rights acquired by any other person, company or corporation, to the use of the waters of the North Platte river, and neither the Mitchell Canal & Irrigation Company or the Mitchell Irrigation District applied to or filed any claim for the use of water from said river with the State Board of Irrigation, or made any proof before said State Board, of the application of water to the irrigation of lands, or otherwise, and neither of said parties made any appearance whatsoever at any time or place in any proceedings had before said State Board of Irrigation, or otherwise, claiming at all times that they were not amendable or subject to the jurisdiction of the State Board of the State of Nebraska.

The Central Canal.

*Twenty-second. That on or about the 23d day of June 1890, the Mutual Irrigation & Water Power Company, a corporation organized

and existing under and by virtue of the laws of the State of Nebraska, posted a notice at a point on the south bank of the North Platte River, about 1192 feet north of the corner of Sections 26, 27, 34 and 35 in township 22 North, Range 56 West of the 6th Principal Meridian, in Scotts Bluff County, Nebraska, which said point

is about 23 miles below the headgate of the Farmers' Canal
352 Company, of its intention to appropriate and divert a sufficient quantity of water from said river at said point to fill a canal 7 feet wide on the bottom, 13 feet wide on the top and 3 feet deep, with a grade of $1\frac{1}{2}$ feet per mile; said water to be conducted through a canal in a southeasterly direction for irrigation and other useful and beneficial purposes; and on the same day a copy of said notice was filed for record and recorded in the office of the County Clerk of Scotts Bluff County, Nebraska.

Twenty-third. That within sixty (60) days after the posting of said notice above mentioned, the said The Mutual Irrigation & Water Company commenced the construction of a canal from said point of diversion and prosecuted the same until about the first day of July, 1891, at which time said canal was finished for a distance of about $4\frac{1}{2}$ miles; that at said time said canal was about 12 feet wide on the bottom with a grade of 2 feet per mile.

Twenty-fourth. That on or about the first day of July, 1891, the said The Mutual Irrigation & Water Company turned water into said canal from the North Platte River, and conducted the same to the lands hereinafter described, that being the place of intended use; and continued to conduct water through said canal during the balance of the irrigation season of 1891.

Twenty-fifth. That on or about the 9th day of November 1891, the said, The Mutual Irrigation & Water Company, sold and conveyed the said canal, together with all water rights acquired by it, and all other rights and franchises appurtenant thereto, to the Central Irrigation Canal & Water Power Company; that on or about the 10th day of November 1891, the said The Central Irrigation Canal & Water Power Company, decided to change the point of diversion of the water of said river, and on said date posted a notice at the point on the south bank of said river to which it intended to
change the point of diversion of said canal, to-wit: A point
353 920 feet west of a point 1400 feet north of the corner of sections 34, 35, 26 and 27, township 23 north, Range 55 West

of the 6th Principal Meridian, of its intention to so change the point of diversion; on the 11th day of November 1891, a copy of said notice was filed in the office of the County Clerk of Scotts Bluff County, Nebraska, recorded in Volume 9 of the Irrigation Records at page 107.

Twenty-sixth. That within sixty (60) days thereafter said, The Central Irrigation Canal & Water Power Company commenced to enlarge said canal and prosecuted the same so that when completed it was 8 feet deep and 50 feet wide at the bottom at the headgate with a grade of 2 feet per mile; at the end of the first mile it was 4 feet deep and 24 feet wide on the bottom, with a grade of 2 feet per mile; at the end of 2 miles it is 2 feet deep and 16 feet wide on

the bottom with a grade of 2 feet per mile; at the end of the 3d mile it is two feet deep, 12 feet wide on the bottom with a grade of $2\frac{1}{2}$ feet per mile. At the end of 4 miles it is 2 feet deep and 8 feet wide on the bottom with a grade of 3 feet per mile; and passed through the following described lands, to-wit: Sections 27, 26, 35 and 36 in Township 22 North, Range 55 West of the Sixth Principal Meridian; Section 1, Township 21 North, Range 55 West; Sections 6, 7, and 5 in Township 21 North, Range 54 West, and about 7 miles in length from the headgate. And said canal has a capacity sufficient to carry one cubic foot of water per second for each seventy acres of land susceptible of irrigation therefrom.

Twenty-seventh. That in July, 1891, water was turned into said canal from the North Platte River and conducted to the land subject to irrigation therefrom, said lands being the place of intended use of said water; that a small portion of the land subject to irrigation from said canal was irrigated during the irrigation season of 1891, and the amount of land irrigated therefrom was increased each year
 354 thereafter until the year 1897, when and since 2,537.28 acres of lands had been irrigated therefrom.

Chimney Rock Canal.

Twenty-eighth. That on or about the 12th day of June 1889, The Chimney Rock Irrigation Canal & Water Power Company, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, posted a notice on the south bank of the North Platte River, about 50 miles below the headgate of The Farmers' Canal Company in Section 6, Township 20 North, Range 52 West in Cheyenne County, Nebraska, of its intention to divert and appropriate a sufficient quantity of water from said river at said point to fill a canal 117 feet in width on the bottom and 3 feet in depth, running in a southeasterly direction from said point of diversion, for irrigation and other useful and beneficial purposes, which said notice was, on or about the 15th day of June 1889, filed in the office of the County Clerk of Cheyenne County, Nebraska and recorded in said office.

Twenty-ninth. That within sixty (60) days after the posting of said notice above mentioned, said The Chimney Rock Irrigation Canal & Water Power Company commenced the construction of a canal at the said point of diversion; that after the prosecution of said work for some time said company found it necessary to change its point of diversion of water from the North Platte River, and it thereafter on, to-wit, the 3d day of December 1890, posted another notice at a point on the south bank of the North Platte River where the west line of the N. E. $\frac{1}{4}$ of Section 1, Township 20 North, Range 53 West intersects the bank of said river, that being the point of said river at which said company located its new point of diversion, of its intention to appropriate a sufficient quantity of water to fill a canal of the dimensions mentioned in the first notice, posted
 355 up by said Company; that thereafter said Company continued the construction of said canal until June 1895, when said canal had been constructed for a distance of $5\frac{7}{8}$ miles from

the headgate thereof; that the width of the headgate thereof was 32 feet; that at a point $\frac{3}{4}$ of a mile from the headgate said canal was 16 feet wide on the bottom, at which point said canal forks, the North branch of which, as then constructed was eight feet wide on the bottom from a point one mile from the headgate to the lower end thereof; that thereafter the south branch of said canal was constructed and finished in the spring of 1896; that at a point three miles below the headgate of said canal said south branch was 16 feet wide on the bottom and narrowed gradually to a width of 8 feet on the bottom at the terminus thereof, said south branch being about 10 miles in length and terminating near the center of Section 24, Township 20 North, Range 52 West. That the capacity of said canal is sufficient to carry one cubic foot of water per second for each seventy acres of land susceptible of irrigation therefrom.

Thirtieth. That in June 1891, said Company commenced to conduct water through said canal and during said year irrigated about 500 acres of land therefrom; that in the year 1895, said company irrigated between 600 and 800 acres of land from said canal and during the year 1896, said Company irrigated about 3,200 acres of land from said canal and the amount of land irrigated therefrom was increased each year thereafter until the year 1900, when and since 5,976 acres of lands have been irrigated therefrom.

The Alliance Canal.

Thirty-first. That at all times hereinafter mentioned, The Alliance Irrigating Canal & Water Power Company was, and still is a duly organized corporation existing under and by virtue of the laws of the State of Nebraska.

Thirty-second. That on the 26th day of December 1892, it caused a notice to be posted on the North bank of the North Platte River in the Northwest Quarter of the Southwest Quarter (N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$) of Section Five (5), Township 20, North, Range 53 West of the Sixth Principal Meridian, in Cheyenne County, Nebraska, of its intention to appropriate and divert water from said river at that point, through a canal to be constructed in a southeasterly direction therefrom; which notice was, on the 31st day of December, 1892, filed in the office of the County Clerk of Cheyenne County, Nebraska, and duly recorded therein.

Thirty-third. That within sixty (60) days thereafter said Alliance Irrigating Canal & Water Power Company began the construction of said canal and pushed the work vigorously so that on the 17th day of July, 1895, it had completed nine miles of said canal, which canal had at and immediately below the headgate, a width on the bottom of $68\frac{1}{2}$ feet and a depth sufficient to flow 2 feet of water therein, which width continued for one half mile; that from one-half a mile below said headgate said ditch had a width on the bottom of 32 feet with a depth sufficient to flow 3 feet of water therein; and was continued to a distance of $1\frac{1}{10}$ miles below said headgate, at which point it narrowed to $28\frac{1}{2}$ feet on the bottom, of sufficient depth to flow 3 feet of water therein; that at 3 miles below said head-

gate it narrowed to 19 feet on the bottom and it gradually narrowed to a width of about 5 feet. That the capacity of said canal is sufficient to carry one cubic foot of water per second for each seventy acres of land susceptible of irrigation therefrom.

Thirty-fourth. That water was turned into said ditch on the 15th day of May 1892, and that in the year 1893, 260 acres of crops were irrigated therefrom, and about 1,000 acres of hay land irrigated in addition; and in the year 1894, there were about 490 acres of crops irrigated in addition to about 1,200 acres in hay land; in the year 1895, about 1,000 acres of crops were irrigated.

357 Thirty-fifth. That said canal extends in an easterly direction from said point of diversion through Sections 5, 4, 2 and 1 in Township 20, through Sections 35 and 36 in Township 21, all in range 52 west; and through a portion of sections 6, 8, 5, 9 and 10, 11, 2 and 1, in Township 20 North, Range 51 West, Cheyenne County, Nebraska; and water taken from said river and conducted through said canal has been used increasingly each year to water lands lying under said ditch, until the year 1909, when about 7,000 acres of lands were irrigated therefrom.

The Browns Creek Canal.

Thirty-sixth. That at the times hereinafter specified, The Browns Creek Irrigation Company, was a corporation duly organized under the laws of the State of Nebraska. That on the 25th day of June 1891, The Browns Creek Irrigation Company, by Michael Elsaas, its President, posted a notice at a point near the Northwest Quarter of Section 28, Township 20 North, Range 50 West in what was then Cheyenne County, Nebraska, of its intention to divert from said North Platte River and appropriate for the purposes of irrigation 10,000 inches of water under a four inch pressure; said point of diversion to be 14.20 chains south, and 27½ degrees west from the Northwest Corner of Section 28, Township 20 North of Range 50 West in Cheyenne County, Nebraska, which said notice was duly filed and recorded in the office of the County Clerk of Cheyenne County, Nebraska, on July 6th, 1891, at 9 o'clock A. M.

That thereafter on the 20th day of January 1892, Michael Elsass posted a second notice at the same point, which said notice was identical with the notice heretofore described, and which said second notice was duly sworn to by the said Michael Elsass and filed for record in the office of the County Clerk of Cheyenne county, Nebraska, on June 3d, 1892 at 9 o'clock A. M. and duly recorded.

358 Thirty-seventh. That the work of construction of said canal was commenced in August 1891 and was continuously prosecuted, so that in the month of June 1893, it had been extended eleven miles in length and was 24 feet in width on the bottom at the headgate.

That work was prosecuted on said canal from year to year until the same was finished in the year 1905, and as finished it was enlarged to a width of 50 feet on the bottom at the headgate for one half miles

below the headgate; to a width of 25 feet from one mile below the headgate to eight miles below the headgate; to a width of 15 feet from eight miles below the headgate —; to a width of twelve feet from twelve miles below the headgate to sixteen miles below the headgate; to a width of ten feet from sixteen miles below the headgate to 20 miles below; and a width of eight feet to the terminus of said canal; and to carry water 3 feet in depth.

That land has been irrigated from year to year and the acreage increased until in the year 1910, there was irrigated from said canal 9,500 acres.

The Ramshorn Ditch.

Thirty-eighth. That on or about the 24th day of March 1892, Yorick Nichols and Carrol Nichols posted a notice on the north bank of the North Platte River at a point in the Southeast Quarter of the Southeast Quarter (S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of Section Twelve (12) Township 23 North, Range 58 West of the Sixth Principal Meridian about $2\frac{1}{2}$ miles below the headgate of the Farmers' Canal Company of their intention to appropriate and divert a sufficient supply of water from said river at said point to fill a ditch 16 feet wide at the bottom and 20 feet wide at the top and 5 feet deep at the headgate; said water to be conducted through a ditch to be constructed in an easterly direction down the valley of the North Platte River for a distance of about $6\frac{1}{2}$ miles, for irrigation and other useful and beneficial purposes; and on the 24th day of March 1893, said notice was filed for record in the office of the County Clerk and Recorder of Scotts Bluff County, Nebraska, and recorded in volume One of Irrigation Records on Page 146.

359 Thirty-ninth. That on or about the 1st day of April 1893, said Yorick and Carrol Nichols commenced the construction of said canal and prosecuted the same continuously until the 1st day of April 1894, at which time said canal was completed for a distance of about $6\frac{1}{2}$ miles from the headgate thereof; and that the dimensions of said canal were as follows: 7 feet deep immediately below the headgate; 16 feet wide on the bottom 30 feet wide on the top with a grade of 2 feet per mile; at 6,000 feet below the headgate, 4 feet deep, 16 feet wide on the bottom, 24 feet wide on top with a grade of 2 feet per mile; at 14,000 feet below the headgate, 2 feet deep, 12 feet wide on the bottom and 16 feet wide on top, with a grade of 2 feet per mile; at 19,000 feet below the headgate, 2 feet deep, 10 feet wide on the bottom and 14 feet wide on top, with a grade of 5 feet per mile; at 22,000 feet below the headgate, 2 feet deep, 8 feet wide on the bottom and 12 feet wide on top, with a grade of 3 feet per mile; at $6\frac{1}{2}$ miles below the headgate, $1\frac{1}{2}$ feet deep, 6 feet wide on bottom and 8 feet wide on top, with a grade of 3 feet per mile; that said canal passes through the following described lands to-wit: Sections 18, 19, 20, 21, 22, and 14 in Township 23 North, Range 57 West of the Sixth Principal Meridian, and has a capacity sufficient to carry one cubic foot of water per second of time for each seventy acres of land susceptible of irrigation therefrom.

Fortieth. That thereafter said Yorick Nichols and Carrol Nichols,

conveyed said canal, together with their right of appropriation of water from the North Platte River acquired by them, together with all rights and privileges appertaining thereto, to the Ramshorn Ditch Company, a corporation organized and existing under the laws of the State of Nebraska, which has ever since been and now is the owner of the same.

Forty-first. That in April 1894, water was conducted through said canal from the North Platte River and applied to the irrigation of about 300 acres of land during said year; that in the year 1895 about 800 acres of the land were irrigated by means of said canal; and in 1896 about 1,500 acres were irrigated therefrom; that the amount of land irrigated from said canal had been gradually increased each year until the year of 1904, when and since 2,340 acres of lands have been irrigated therefrom.

The Nine Mile Canal.

Forty-second. That on or about the 28th day of November 1890, The Bayard Irrigation Canal & Water Power Company, a corporation organized and existing under the laws of the State of Nebraska, posted a notice on the North bank of the North Platte River at a point in the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Section 18, Township 21 North, Range 53 West of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, of its intention to appropriate from the North Platte River a sufficient quantity of water to fill a canal 42 $\frac{1}{2}$ feet on the bottom and 2 feet deep, for irrigation, power and other useful purposes, to be conducted through a canal to be constructed in an easterly direction from said point of diversion, which said notice was, on the 6th day of December 1890, filed for record in the office of the County Clerk of Scotts Bluff County, Nebraska, and duly recorded in said office.

Forty-third. That within sixty (60) days after the posting of said notice above mentioned, said Company commenced the construction of a canal from said point of diversion and prosecuted work thereon continuously until the summer of 1891: that in August 1891, said Company caused another notice to be posted at said point of diversion of its intention to appropriate 40,000 inches or 800 cubic feet of water per second of time from said river in addition to its former appropriation, which said notice was, on the 18th day of September 1891, recorded in the office of the County Clerk of Scotts Bluff County, Nebraska: that shortly after the posting of the last mentioned notice, said company because of financial difficulties and disagreements among its stockholders, suspended work on said canal and did not again resume work thereon; that in August 1893, The Nine Mile Canal & Reservoir Company was incorporated under and by virtue of the laws of the State of Nebraska, and ever since said time has been a corporation organized and existing under and by virtue of the laws of the State of Nebraska; that immediately after the organization of said last mentioned Company, said Bayard Irrigation Canal & Water Power Company sold, conveyed and transferred to said The Nine Mile Canal & Reservoir Company, its canal, together with all water rights, franchises and appropriations acquired

by it; that in August 1893, said The Nine Mile Canal & Reservoir Company resumed work on said canal and prosecuted the same continuously until the year 1895, when the first twelve miles of said canal was constructed; that on the 6th day of December 1893, The Nine Mile Canal & Reservoir Company posted a notice at said point of diversion, wherein and whereby said Company claimed the water flowing in the North Platte River at said point to the extent of 240 cubic feet of water per second of time, for irrigation, power and other useful purposes, which said notice was, on the 9th day of December 1893, recorded in the office of the County Clerk of Scotts Bluff County, Nebraska, in volume A of Irrigation Records at page 176; that said canal was finished by said The Nine Mile Canal & Reservoir Company in the year 1898, and when finished was 21 miles in length; that said canal was 20 feet wide on the bottom at or immediately below the headgate thereof, with a grade of 2 feet per mile and a depth of $1\frac{1}{2}$ feet; that at a point 3 miles below the headgate of said canal, it narrowed to a width of 16 feet on the bottom and 21 feet on top, and a depth of 2 feet, with a grade of 2 feet per mile; that at a point 6 miles below the headgate thereof said canal had narrowed to a width of 12 feet on the bottom and $16\frac{1}{2}$ feet on top, 2 feet deep, with a grade of 2 feet per mile; that at a point 11 miles from said headgate said canal had narrowed to 10 feet on the bottom and $15\frac{1}{2}$ feet on top, 2 feet deep, with a grade of 2 feet per mile, and said canal passes through the following lands, to-wit: Sections 17, 362 18, 10, 15, 14. and 13, Township 20 North, Range 53 West; Sections 19, 20, 28, 27, 35 and 36 Township 21 North, Range 52 West; Sections 2 and 1, Township 20 North, Range 52 West; Sections 31, 32 and 33, Township 21 North, Range 51 West; Sections 6, 5 and 4 Township 20 North, Range 51 West. That said canal has a capacity sufficient to carry one cubic foot of water per second for each seventy acres of land susceptible of irrigation therefrom.

Forty-fourth. That thereafter The Nine Mile Canal & Reservoir Company sold, conveyed and transferred said canal, together with all rights of appropriation and rights to the use of water acquired by it and all other franchises and privileges to The Nine Mile Irrigation District, a corporation organized and existing under and by virtue of the laws of the State of Nebraska, which said The Nine Mile Irrigation District has ever since said time been and now is the owner thereof.

Forty-fifth. That in the year 1895 water was conducted through said canal from said river and applied to the irrigation of about 1,300 acres of land; that the land irrigated therefrom was increased to about 1,800 acres in the year 1896; that the amount of land irrigated from said canal had been increased each and every year thereafter until the commencement of this suit, when 5,906 acres of lands had been irrigated therefrom.

The Steamboat Ditch.

Forty-sixth. That at all times hereinafter mentioned, The Steamboat Ditch Company was and now is a corporation organized and

existing under and by virtue of the laws of the State of Nebraska; that on the 22nd day of October 1895, said corporation made application to the State Board of Irrigation of the State of Nebraska for a permit to appropriate 35 cubic feet of water per second of time from the North Platte River for the irrigation of lands described in said application, to-wit: Parts of S. E. $\frac{1}{4}$ Section 4, S. W. $\frac{1}{4}$ Section 3,

363 N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ Section 10, N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ Section 14, S. W. $\frac{1}{4}$, Section 11, S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ Section 13, N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ Section 24, all in township 21, Range 54 and parts of N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, Section 19, N. W. $\frac{1}{4}$ Section 30, N. E. $\frac{1}{4}$ Section 30, and Section 29, all in township 21, Range 53, lying between said proposed Steamboat Ditch and the Castle Rock Irrigation Canal already constructed and such lands lying under said Castle Rock Canal as cannot be irrigated therefrom, without great difficulty or for which said Castle Rock Canal does not furnish water, amounting in all to 750 acres: that said application for a permit to appropriate water from the North Platte River was granted by said State Board of Irrigation of the State of Nebraska, subject to the following limitations and conditions, to-wit:

1st. The work of excavation or construction shall begin on or before April 1st 1897.

2nd. The time for completing the work or perfecting the appropriation shall extend to September 1st, 1900.

3rd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1900.

4th. The amount of the appropriation shall not exceed fifteen (15) cubic feet per second and shall be limited to one cubic foot per second of time for each seventy (70) acres of land reclaimed on September 1st, 1900.

5th. The territory claimed and the amount of water already acquired by prior appropriators from this stream and its tributaries, having not yet been determined, therefore formal notice is hereby given that this permit may not carry with it the right to any water whatever nor the right to irrigate all the territory applied for.

Forty-seventh. That The Steamboat Company did commence the construction of its canal in May 1896 and prosecuted the same to completion and did complete the same in the month of May 1896.

Forty-eighth. That the headgate of said canal is located on the south bank of the North Platte River in the S. E. $\frac{1}{4}$ of the 364 N. W. $\frac{1}{4}$ of Section 4, Township 21 North, Range 54 West of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, from which point said canal extends in a southeasterly direction through Sections 4, 10, 14 and 24 in said Township and Range, and through a portion of Sections 19 and 30, Township 21 North, Range 53 West of the Sixth Principal Meridian: that said canal, when completed was 20 feet wide on the bottom at and for a quarter of a mile below the headgate thereof and 16 feet in width for the next mile, 12 feet in width for the next mile and gradually reducing to the end, with a grade of $1\frac{1}{2}$ feet per mile and carries water to a depth of 3 feet at the headgate thereof and is capable of

carrying one cubic foot of water per second of time for each seventy acres of land susceptible of irrigation therefrom.

Fiftieth. That water was conducted through said canal and about 300 acres of land irrigated therefrom during the irrigation season of 1896, since which time the acreage therefrom has been increased each and every year until the year 1901, at which time the following described lands had been irrigated and reclaimed through and by means of said canal, to-wit: 120 acres in Section 14, 40 acres in Section 13, 260 acres in Section 24, Township 21 North, Range 54 West; 150 acres in Section 19, 120 acres in Section 30, Township 21 North, Range 53 West, 50 acres in Section 2, 9 acres in Section 10, Township 21, Range 54; making a total of 830 acres; that on or about the 14th day of July 1903, The Steamboat Ditch Company made proof on a blank provided by the State Board of Irrigation for that purpose, of the irrigation of the lands above described, and filed the same in the office of the Secretary of the State Board of Irrigation on or about the 17th day of July 1903; that each share of stock in The Steamboat Ditch Company represents a water right for ten acres of land, and all of the stock of said Company has, at all times above mentioned, been owned by the owners of the land irrigated from the canal of said Company and all of the above described lands have been irrigated from said canal during each and every year since the year 1901.

The Gering Ditch.

51st. The Gering Irrigation District was, and now is, a corporation organized under the provisions of an act of the Legislature of the State of Nebraska, entitled, "An act to provide for the organization and government of Irrigation Districts and to provide for the acquiring of canals already built or partly constructed; for the acquiring of the rights of way to build irrigation ditches or canals and other property; for the dividing of certain portions of the State of Nebraska into irrigation districts and for said irrigation districts to vote bonds for the purpose of constructing irrigating canals; for the purpose of buying and purchasing by said irrigation districts irrigation canals already constructed or partially constructed and the paying for the same; providing for a system of revenue to be raised by taxation upon the property in said irrigation districts, to pay the interest and principal of said bonds and the manner in which the same shall be done; the holding of elections in said districts for the purpose of electing officers; providing for the management of said districts; also providing for the increase and enlargement of said districts whenever it may be necessary to increase their size." Approved March 26, 1895.

Fifty-second. That on the 15th day of March 1897, The Gering Irrigation District made application to the State Board of Irrigation of the State of Nebraska for a permit to appropriate 555 cubic feet of water per second of time from the North Platte River for the irrigation of the lands embraced within the boundaries of said irrigation district, which said lands were described in said application

for said permit and which are the same lands hereinafter described in the certificate issued by the State -- of Irrigation. That said application for a permit to appropriate water from the North Platte River was granted by said the State Board of Irrigation of the State of Nebraska, subject to the following limitations and conditions,
366 to-wit:

"1st. The work of excavation or construction shall begin on or before June 1st, 1898.

2nd. The time for completing the work or perfecting the appropriation shall extend to September 1st, 1900.

3rd. The time for completing the application of water to a beneficial use shall extend to September 1st, 1900.

4th. The amount of appropriation shall not exceed 500 cubic feet per second and shall be limited to one cubic foot per second for each seventy (70) acres of land reclaimed on September 1st, 1905.

5th. The territory claimed and the amount of water already acquired by prior appropriations from this stream and its tributaries having not yet been determined therefor, formal notice is hereby given that this permit may not carry with it the right to any water whatever nor the right to irrigate all the territory applied for.

Fifty-third. That The Gering Irrigation District did commence the construction of its canal before June 1st, 1898, as in said application described and did prosecute said work to completion and did construct the same before the 1st day of September, 1900.

Fifty-fourth. That the headgate of said canal is located on the south bank of the North Platte River in the S. E. $\frac{1}{4}$ of Section 4 Township 23 North, Range 58 West of the Sixth Principal Meridian, in Scotts Bluff County, Nebraska, from which point said canal extends in a southeasterly direction through sections 9, 10, 15, 22, 23, 26, 25, 36 of Township 23 North, Range 58 West of the 6th Principal Meridian, Sections 31, 32, 33, 34, 35 and 36 of Township 23 North of Range 57 West of the 6th P. M., Section 31 of Township 23 North, Range 56 West of the 6th P. M., Sections 6, 5, 8, 9, 16, 15, 14, 23, 26 and 25 of Township 22 North, Range 56 West of the 6th P. M., Sections 30, 29, 28, 27, and 34 Township 22 North, Range 55 West of the 6th P. M., Sections 3, 10, 15, 22, 26 and 25 of Township 21 North Range 55 West of the 6th P. M., Sections 30, 19, 20, 21, 16, 15, 14, 22, 27 and 33 of Township 21 North, Range 54 West
367 of the 6th P. M.; Sections 5, 4, 9, 10, 11, 2, 1, of Township

20 North, Range 54 West of the 6th P. M. That the intake of said ditch was and is 125 feet wide and carries water to a depth of 3 feet until it intersects the canal of the Mitchell Irrigation District. That the intake ditch of The Gering Irrigation District intersects the canal of the Mitchell Irrigation District at a point about 3 miles below the headgate, from which point The Gering Irrigation District and The Mitchell Irrigation District use one and the same canal to a point in section 29 Township 22 North, Range 56 west of the 6th P. M., from which point the remainder of said canal belongs exclusively to the Gering Irrigation District. That the portion of said canal used jointly by The Gering Irrigation District and the Mitchell Irrigation District is 7 feet deep, 40 feet wide on the bot-

tom, 60 feet wide on top and has a grade of one foot per mile; that said canal is 6 feet deep, 30 feet wide on the bottom, 40 feet wide on top with a grade of one foot per mile from a point about 20 miles below the headgate thereof to a point about 40 miles below the headgate thereof. That said canal is 3 feet deep, 30 feet wide on the bottom, 26 feet wide on top, with a grade of one foot per mile from a point about 40 miles below the headgate to a point about 50 miles below the headgate thereof. That said canal is 3 feet deep, 12 feet wide on the bottom and 18 feet wide on top, with a grade of one foot per mile from a point about 50 miles below the headgate to the terminus thereof.

Fifty-fifth. That upon the completion of said canal water was conducted through the same for the irrigation of the lands included in said irrigation district. That a portion of said lands were irrigated during the year 1900. That the amount of land irrigated through and by means of said canal was increased each and every year from the year 1900 until the year 1905, when all of said lands had been irrigated.

368 Fifty-sixth. That thereafter and on, to-wit, about the 27th day of October 1905, said The Gering Irrigation District by its proper officers made proof of the application of water to all of the above described lands and filed the same with the State Board of Irrigation of the State of Nebraska. That thereafter and on, to-wit, about the 2nd day of November 1907, said the State Board of Irrigation of Nebraska issued a certificate of appropriation of water to The Gering Irrigation District, which is in words and figures following, to-wit:

UNITED STATES OF AMERICA,
State of Nebraska:

Certificate No. 322.

Division No. 1-A.

Office of State Board of Irrigation.

Certificate of Appropriation of Water.

This is to certify, that The Gering Irrigation District of Gering, State of Nebraska has appropriated water from the North Platte River to be used through the Gering Canal for irrigation and that the State Board of Irrigation under the provisions of Art. 2, of the Irrigation Law of the State of Nebraska, has determined and established the priority and amount of the said appropriation, as follows:

The priority of the appropriation dates from March 15, 1897, the priority for the water-shed is No. 176, and the priority for the stream is No. 54.

The amount of the appropriation is $208\frac{5}{8}$ cubic feet per second; the amount of prior appropriation from the water-shed is — cubic feet per second, and the amount of prior appropriation from the

stream is — cubic feet per second. The lands to be irrigated are: 17.50 acres in Section 26, 50.93 acres in Section 27, 131.40 acres in Section 34, 566.01 acres in Section 35, and 130.97 acres in Section 36 of Township 22, North, Range 55 West; 646.76 acres in Section 1, 713.60 acres in Section 2, 50.84 acres in Section 3, 28.14 acres in Section 10, 633.06 acres in Section 11, 637.23 acres in Section 12, 637.00 acres in Section 13, 656.00 acres in Section 14, 339.70 acres in Section 15, 110.49 acres in Section 22, 497.70 acres in Section 23, 565.14 acres in Section 24, of T. 21 N., R. 55 W.; 24.93 acres in Section 4, 87.61 acres in Section 5, 300.68 acres in Section 6, 558.22 acres in Section 7, 585.33 acres in Section 8, 213.97 acres in Section 9, 18.31 acres in Section 10, 261.18 acres in Section 14, 309.39 acres in Section 15, 413.76 acres in Section 16, 626.15 acres in Section 17, 628.84 acres in Section 18, 329.24 acres in section 19, 110.44 acres in Section 20, 40 acres, Sec. 4, 82.31 acres in Section 22, 617.25 acres in Section 23, 336.37 acres in Section 24, 309.25 acres in Section 25, 633.37 acres in Section 26, 537.57 acres in Section 27, 320.50 acres in Section 34, 581.56 acres in Section 35, and 293.25 acres in Section 36, of T. 21, N., R. 54 W.; 77.33 acres in Section 4, of T. 20 N., R. 54 W. of the 6th P. M., amounting in all to 14,621.34 acres.

The right to water herein confirmed is restricted to the irrigation of the above described land.

The amount of appropriation shall not exceed the amount herein stated; nor shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation is limited to one seventieth (1/70) of a cubic foot per second of time for each acre of the above described land to which water is actually and usefully applied for irrigation.

I, George Lawson Sheldon, President of the State Board of Irrigation of the State of Nebraska, have hereunto set my hand this 2nd day of November 1907.

GEORGE LAWSON SHELDON,
President.

370 Attest:
ADNA DOBSON, *Secretary.*

Fifty-seventh. That on or about the 28th day of May 1895, the County Clerk of Scotts Bluff County, and the County Clerk of Cheyenne County, Nebraska, each made a transcript of the notices of appropriation at that time filed in their respective offices by the various appropriators above named, and transmitted the same to the Secretary of the State Board of Irrigation of the State of Nebraska, and said transcript of said notices was filed by the said Secretary of the State Board of Irrigation in his office on the 31st day of May 1895; That after the filing of said transcript in the office of the Secretary of the State Board of Irrigation of the State of Nebraska, said Secretary forwarded to each of the various claimants named in said notices, a blank "Claim for the Waters of the State of Nebraska," to be

District, No. _____
Water Division, No. _____
(The above to be filed out at the office of Board)

Sec. 30, 31, 32 T19 N of R 47 W Sec. 1, 2, 3, 18 N of R 47 W
Sec. 5, 6, 7 T18 N of R 46 W

amounting in all to 135.00 acres.
(Total number of acres)

12th.—That the actual work of excavation and construction was begun on the twentieth day of January 1892, and the work will be completed, and the appropriation perfected on the first day of January, 1898.

(a) That this claim is made, under and by virtue of rights deemed to have been acquired by posting notice of filing same with County Clerk.
(State whether by application of water to a beneficial use without objection, or by posting notice and filing same with County Clerk, as prescribed by law. If by use, state nature, date of commencement, and period of duration: if by filing, state date of posting notice, date of record, and where recorded.)

Notice posted Jan. 20, 1892, filed with the County Clerk of Cheyenne Co. State of Nebraska on the 23 day of January, 1892, also with Secretary of State.

(b) That water was turned into said ditch or canal on or before the 23 day of June (Was, or will be) 1893.

13th.—That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is three (3) years from April 4th, 1895.

(c) That there were 360 acres of crops actually irrigated from said ditch or canal during 1893 (Number of acres.)

(d) That it is estimated that there will be 1700 acres of crops irrigated from said ditch or canal during 1895. (Number of acres)

14th.—That the relation which the subscriber to this affidavit bears to said ditch or canal, or other work, is that of Secretary
and that he is authorized to make this affidavit in behalf of the interests affected.
(State whether owner, manager, superintendent, etc.)

Mike Burline.
(signature.)

State of Nebr. } ss.
County of Cheyenne } hereby certify that the foregoing claim was signed in my presence
and sworn to before me by Mike Burline
this 19th day of June 1895

Francisco A. Jilsson
Notary Public.

(SEAL)

Claim, No. 47

Priority, No. _____

Division, No. 1A District, No. _____

CLAIM FOR THE WATERS
OF THE
STATE OF NEBRASKA

State of Nebraska }
for State Board of Irrigation } ss.

This instrument was filed for record at
Nine o'clock, fore noon,
the 24 day of June 1895
and duly recorded in Book _____ of the
Record of Claims for Appropriations on Page _____

R. B. Howell
State Engineer, Secretary.

TOWNSHIP PLATS—Showing Line of Ditch or Canal

The following township plats, _____ in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

Signature of person signing application.

NOTICE—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

1

Township _____ Range _____ Mer. _____ County _____

3	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
29	29	28	27	26	25
31	32	33	34	35	36

2

Township _____ Range _____ Mer. _____ County _____

6	3	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
29	29	28	27	26	25
31	32	33	34	35	36

TOWNSHIP PLATS—Showing Line of Ditch or Canal

3

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

4

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

filled out, giving the information therein required, regarding the claim of each of said parties for the use of the water of the North Platte River.

Fifty-eighth. That the blank claim received by The Browns Creek Irrigation Company from the Secretary of said Board was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 24th day of June 1895, which said claim, *whom* filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 371 and 372.)

373 Fifty-ninth. That the blank claim received by The Chimney Rock Irrigation Canal & Water Power Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 28th day of June 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 374 and 375.)

Case No. _____
Water Division, No. _____
District, No. _____

Claim for the Waters of the State of Nebraska

I, John Royer of the County of Chesapeake State of Nebraska being duly sworn, upon my oath say:
(Name of person signing claim.) (City or Village of which a resident.)
1st.—That the name of the Claimant is The Chimney Rock Irrigation Canal & Water Power Co.
(Name of State)
2d.—That the name of the Claimant is The Chimney Rock Irrigation Canal & Water Power Co.
(Name of person or company upon whom claim is based.)
Post Office Address, No. _____ Street, _____ City or Village, _____
(Name and Street)

Chesapeake County, Nebraska State.
(County.) (State.)
3d.—That the water is claimed for the purpose of Irrigation & Water Power.
(State the purpose for which water is claimed.)
4th.—That the name adopted for the ditch or canal is the Chimney Rock Canal.
(Name of ditch or canal.)
5th.—That the source of the appropriation claimed is The North Platte River.
(Name of creek or river from which water is claimed.)
6th.—That the amount of the appropriation claimed is 42,000 miners inches or 840 cubic feet per second of time.
(Number of cubic feet.)

7th.—That the headgate is located on the South bank of the stream, in
(North, South, East, or West.)
8 W 1/4 of NE 1/4 of Section one, Township 2 S,
(Describe by survey lines in which situated.) (Number.)
Range 5 S W 1/4 of the Principal Meridian.
(Range East or West) (Number of Miles.)

8th.—That the ditch or canal, North Branch 5 7/8 miles in length, passes
(Number of Miles.)
through the following sections of land, as shown on the accompanying township plat, viz:
Section 1 Range 5 3/4 W Township 2 S and Sections 6, 7, 8, 9, 16,
15, 14 of Township 2 S Range 5 3/4 W,
South Branch 1.1 miles in length running through
Sections 7, 8, 17, 16, 21, 22, 23, 24, 25, 24 and 13 of Township
2 S of Range 5 S W, and through sections 30, 29, 19,
in Township 2 S Range 5 1/4 W.

(a) That the portion of said ditch or canal, 5 7/8 miles in length, indicated
(Number of miles.)
on said plat by a black line is completed.
(b) That the portion of said ditch or canal, eleven (11) miles in length, indicated on said plat
(Number of miles.)
by a red line is not completed.

9th.—That the dimensions of said ditch or canal are (and will be for the uncompleted portions) as follows: HEAD-
GATE—width in clear _____ feet; depth of water on floor at low water _____ feet.

Location	Depth	Width on Bottom	Width on Top	Grade per Mile
Below Headgate	_____ feet	_____ feet	_____ feet	_____ feet
At _____ mile	_____ feet	_____ feet	_____ feet	_____ feet
At _____ mile	_____ feet	_____ feet	_____ feet	_____ feet
At _____ mile	_____ feet	_____ feet	_____ feet	_____ feet
At _____ mile	_____ feet	_____ feet	_____ feet	_____ feet
At _____ mile	_____ feet	_____ feet	_____ feet	_____ feet
At _____ mile	_____ feet	_____ feet	_____ feet	_____ feet
At _____ mile	_____ feet	_____ feet	_____ feet	_____ feet

10th.—That the total excavation amounts to _____ cubic yards of material, consisting of
Clay, sand and gravel
(State character of material, whether rock, boulders, sand, clay, etc.)
and that the total length of fencing required is _____ feet.

(a) That the material thus far removed amounts to _____ cubic yards.
(Number of feet)
(b) That the fencing completed amounts to None feet.
(Number of yards)
10th. That the estimated cost of said ditch or canal is as follows: Earthwork, \$ _____
Fencing, \$ None Headgate, \$ _____ Other expenses, \$ _____ Total, \$ _____
(a) That the expenditures thus far incurred are as follows: Earthwork, \$ _____
Headgate, \$ _____ Other expenses, \$ _____ Total, \$ 12.57.

11th.—That it is the intention that the said ditch or canal shall supply water to irrigate the following sections or quarter-
sections of land, viz: Part of Sections 6, 7, 17, 16, 21, 22, 23, 24 and
all of Sections 8, 9, 10, 11, 12, 13, 14, 15 in Township 2 S
Range 5 1/4 W and part of Sections 30, 19, and 21 in
Township 2 S Range 5 1/4 W
(Give sections and quarter-sections, stating number Township and Range)

amounting in all to 6770 acres.
(Total number of acres)

1st.—That the actual work of excavation and construction was begun on the day of June, 1899, and the work will be completed, and the appropriation perfected on or before the 1 day of _____, 1899.
(Were or will be.)

(a) That this claim is made, under and by virtue of rights deemed to have been acquired by posting notice and filing same with the County Clerk of Scotts Bluff County, State of Nebraska, without objection or by posting notice and filing same with County Clerk, as prescribed by law. If by law, state nature, date of commencement, and period of duration. If by filing, state date of posting notice, date of record, and where recorded.)

(b) That water was turned into said ditch or canal on or before the day of June, 1891.
(Was, or will be.)

18th.—That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is thirty-three years from April 1st, 1895.
(State number of years.)

(c) That there were 3280 acres of crops actually irrigated from said ditch or canal during 1894.
(Number of acres.)

(d) That it is estimated that there will be 4000 acres of crops irrigated from said ditch or canal during 1895.
(Number of acres.)

14th.—That the relation which the subscriber in this affidavit bears to said ditch or canal, or other work, is that of President
(State whether owner, manager, superintendent, etc.)

and that he is authorized to make this affidavit in behalf of the interests affected.

State of Nebraska }
County of Cheyenne } ss.
and sworn to before me by John Boyer
this Twenty-fifth day of June, 1895.
(SEAL)

John Boyer
(signature)

Paul Landos
Notary Public,
Justice of the Peace.

NOTICE.—The above claim affidavit must be signed and sworn to by some person closely related in interest (or having authority, delegated or otherwise, to make affidavit,) to the ditch, canal, or other work in question; preferably by the owner or president, secretary, or manager of the company controlling same.

Too much care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken (up on the ground) by and under secretaries, to complete the record from which the Board will determine the rights and priority of the claimant. Therefore, generalities must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within 15 day, from June 17, 1895. De-

lay and arguement will jeopardize the rights of claimants.
Proposed extensions and enlargements of canals, ditches, or other works, not protected by new filings made previously to April 4th, 1895, must not be included in the above claim. Individuals or corporations desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the Statute now in force.

STATE BOARD OF IRRIGATION,
R. B. HOWELL, State Engineer, Secretary.

CLAIM FOR THE WATERS
OF THE
STATE OF NEBRASKA

State of Nebraska } ss.
Office State Board of Irrigation }

9:15 o'clock, a.m. June 28, 1895
on the 28 day of June 1895
and duly recorded in Book _____ of the
Record of Claims for Appropriations on Page _____

State Engineer, Secretary.
R. B. Howell

Dictation, No. _____
Priority, No. _____
Claim, No. 81

TOWNSHIP PLATS—Showing Line of Ditch or Canal

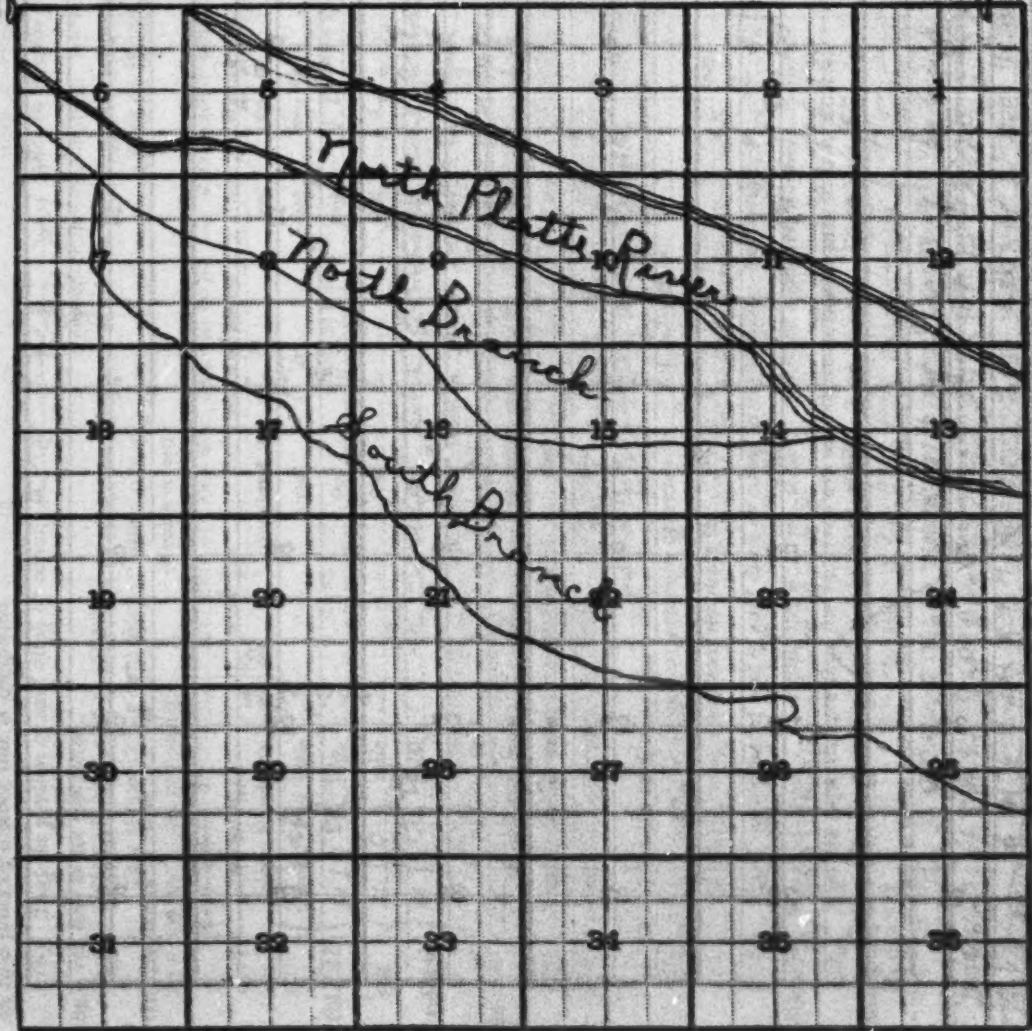
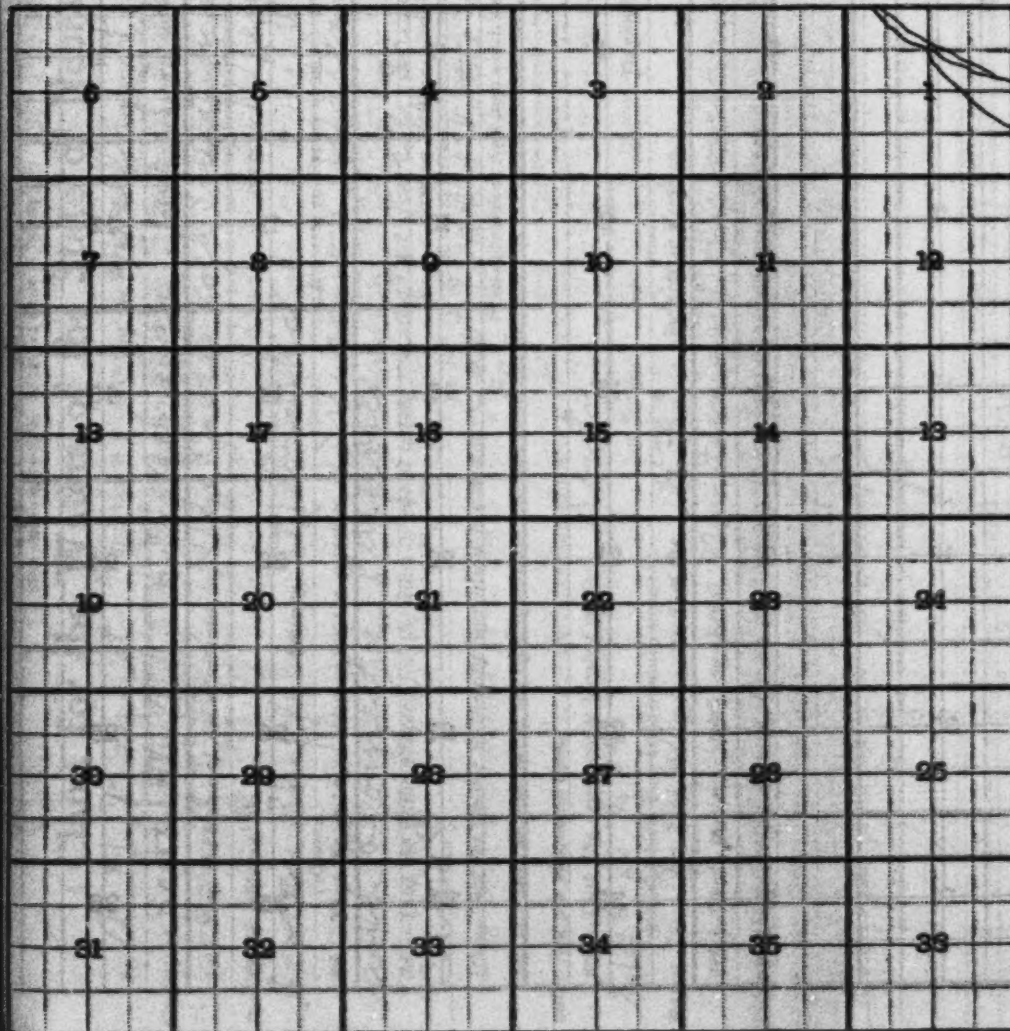
The following township plats, _____ in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

375

Signature of person signing application.

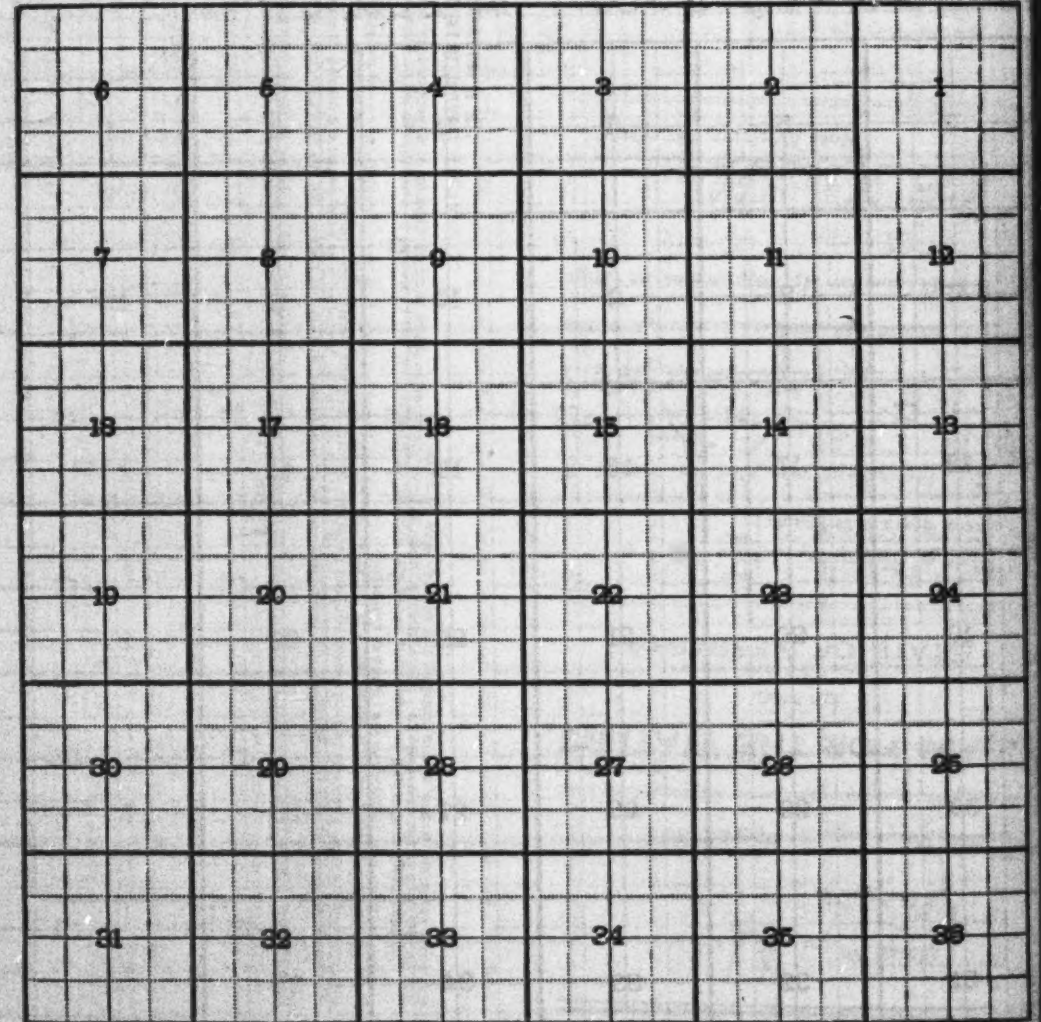
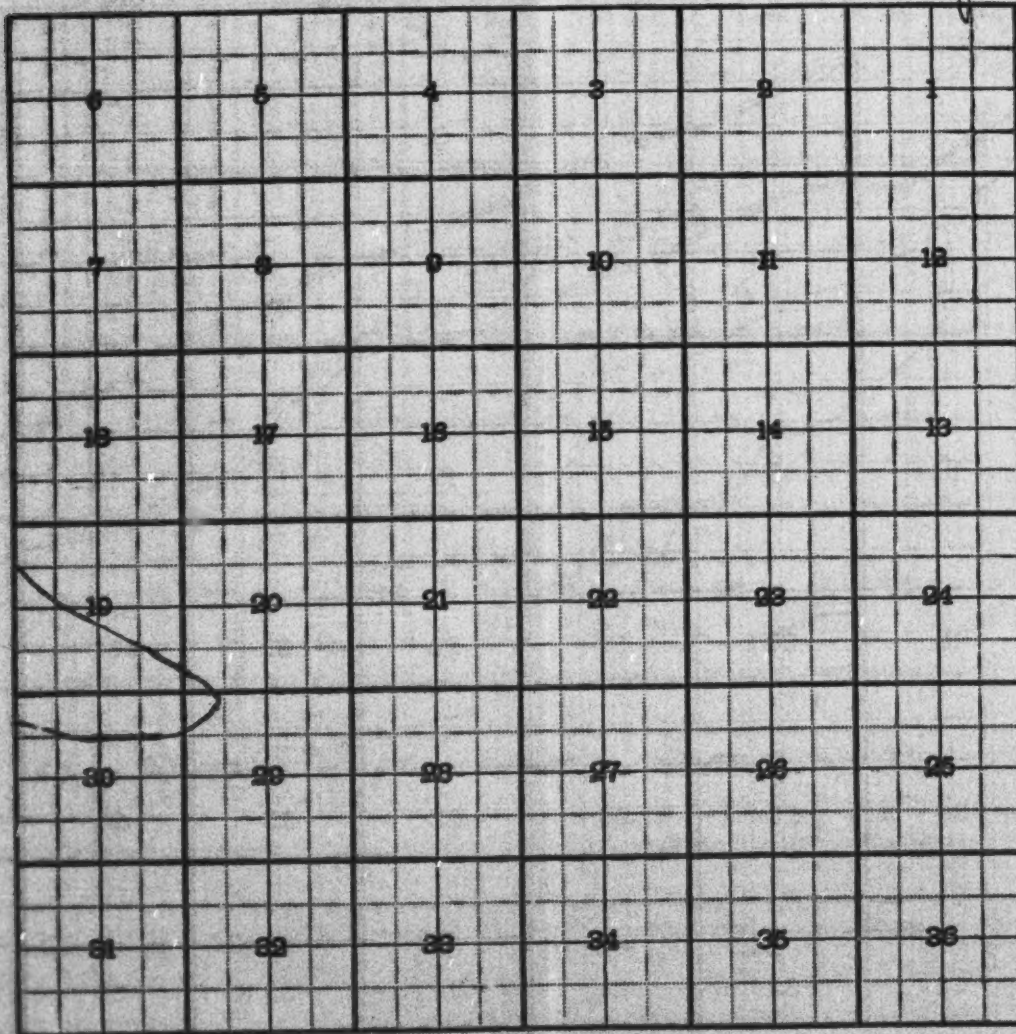
NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plate, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plat No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, following, etc., must be done in ink, free from blots or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 20 Range 53W ¹ Mer. South County Scotts Bluff Township 20 Range 52W ² Mer. South County Cheyenne



TOWNSHIP PLATS—Showing Line of Ditch or Canal

Township 20 Range 51W Mer. 3 County Cheyenne Township 4 Mer. 6 County Cheyenne



SW⁴ of Sec. 21, SW⁴ of Sec. 27, NE⁴ of Sec. 33 all of T2.1 Range 53W.
SW⁴ of Sec. 31, T2.1 R52W, E^{1/2} of Sect. 4, E^{1/2} of Sec. 9, NW^{1/4} of Sec. 15, Sections
1, 2, 3, 4, 11 and 12 all of Town 20, Range 53 West of 6th P.M. and SW⁴ of
Sec. 6 and NW^{1/4} of Sec. 18 or all of Town 20 R51. Where described lands
lying between the said ditch and the North Platte River.

amounting in all to 3780 acres.
15th.—That the actual work of excavation and construction was begun on the 1st day of June 1889, and the works will be completed and the appropriation perfected on or before the 1st day of January 1891.

(a) That this claim is made, under and by virtue of rights deemed to have been acquired by posting notice and filing same with County Clerk as prescribed by law and filing same with County Clerk as prescribed by law (State whether by application of water to a beneficial use without objection or by posting notice and filing same with County Clerk as prescribed by law. If by use, state nature, date of commencement, and period of duration. If by filing, state date of filing notice, date of record, and where a point being 12 1/4 ft north of 9 1/2 stakes east from the S.E. corner of Sec. 14, T2.1 R54 and filed for record in the office of the County Clerk, April 25, 1889 and recorded the 29th "A" of Irrigation Record on page 67.

(b) That water was signed into said ditch or canal on or before the 4th day of June 1893 (Was, or will be)

15th. That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is ten years from April 4th, 1895.

(c) That there were 150 acres of crops actually irrigated from said ditch or canal during 1893 (Number of acres.)

(d) That it is estimated that there will be 240 acres of crops irrigated from said ditch or canal during 1895. (Number of acres.)

14th.—That the relation which the subscriber to this affidavit bears to said ditch or canal, or other work is that of President of the Castle Rock Irrigation Canal and Water Power Company and that he is authorized to make this affidavit in behalf of the interests affected.

(State whether owner, manager, superintendent, etc.)

A. J. Baguet
(Signature.)

State of Nebraska,

County of Scotts Bluff,

and sworn to before me by A. J. Baguet
this 3rd day of July 1895

I hereby certify that the foregoing claim was signed in my presence

M. J. Hoffman
Notary Public.
My commission expires November 4, 1895.

(SEAL)

NOTICE.—The above claim affidavit must be signed and sworn to by some person closely related in interest (or having authority, delegated or otherwise, to make affidavit,) to the ditch canal, or other work in question; preferably by the owner or president, secretary, or manager of the company controlling same.

Too much care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken (upon the ground) by under Secretaries, to complete the record from which the Board will determine the rights and priority of the claimant. Therefore, generalities must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within 15 days from 13th of June 1895.

Proposed extensions and enlargements of canals, ditches or other works, not protected by new filings made previously to April 4th, 1895, must not be included in the above claim affidavits of individuals or corporations, desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the Statute now in force.

STATE BOARD OF IRRIGATION.

R. E. HOWELL, State Engineer, Secretary.

CLAIM FOR THE WATERS
OF THE
STATE OF NEBRASKA
This instrument was filed for record at
the 5 day of July 1895
after noon,
and duly recorded in Book
of the
Record of Claims for Appropriations on Page
119
Priority, No. 1A
District, No.
Station, No.

R. E. Howell
State Engineer, Secretary.

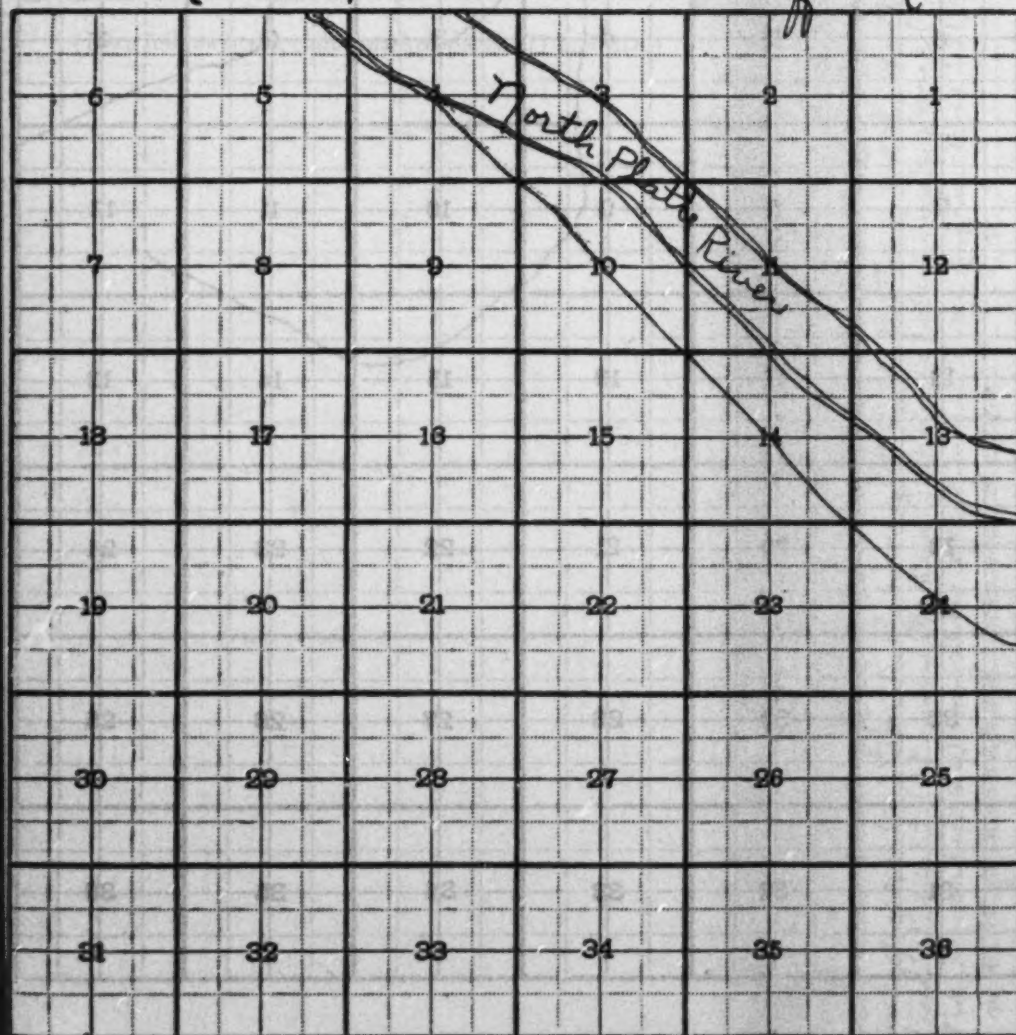
TOWNSHIP PLATS--Showing Line of Ditch or Canal

The following township plats, 1, 2, 3 and 4 in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course. (No. filled out)

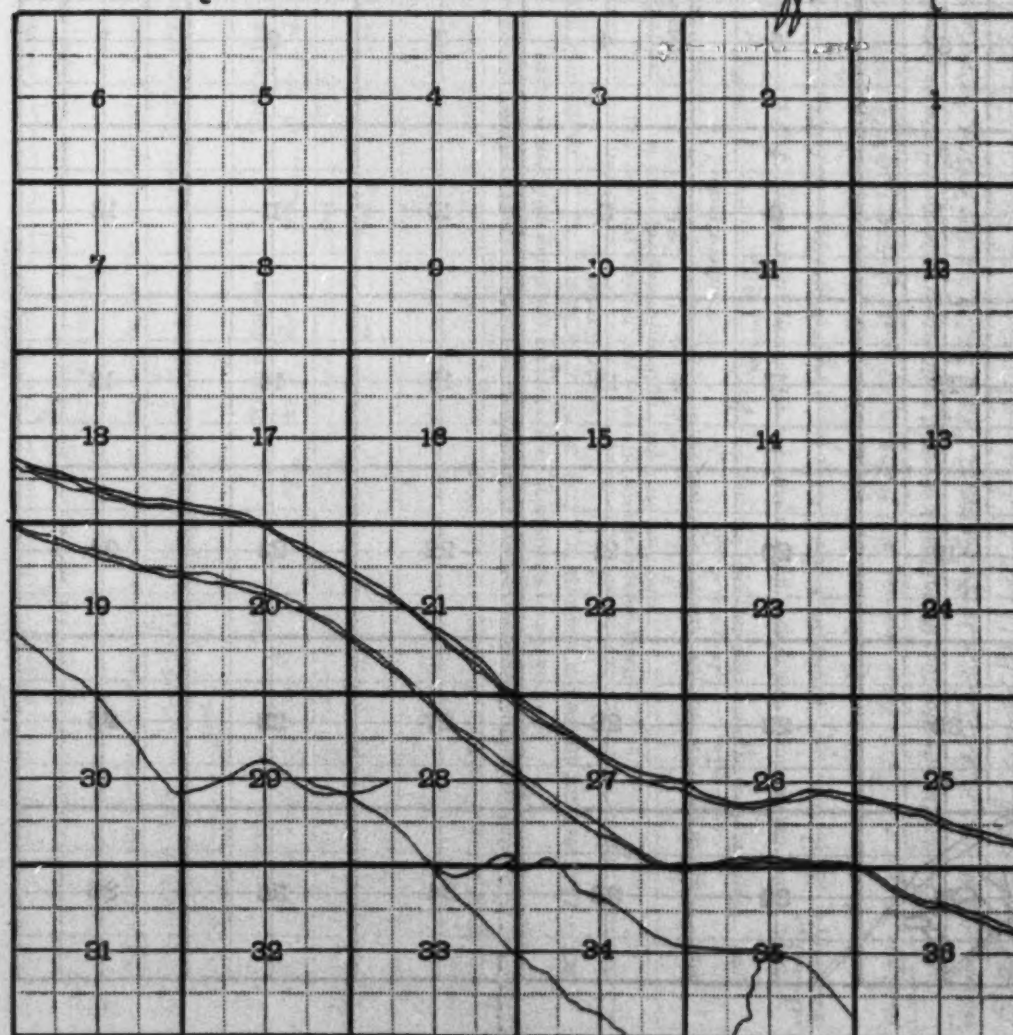
A. J. Baquet
Signature of person signing application.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plat, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blot. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 21 N Range 54 W 6th P Mer. Scotts Bluff County Nebr

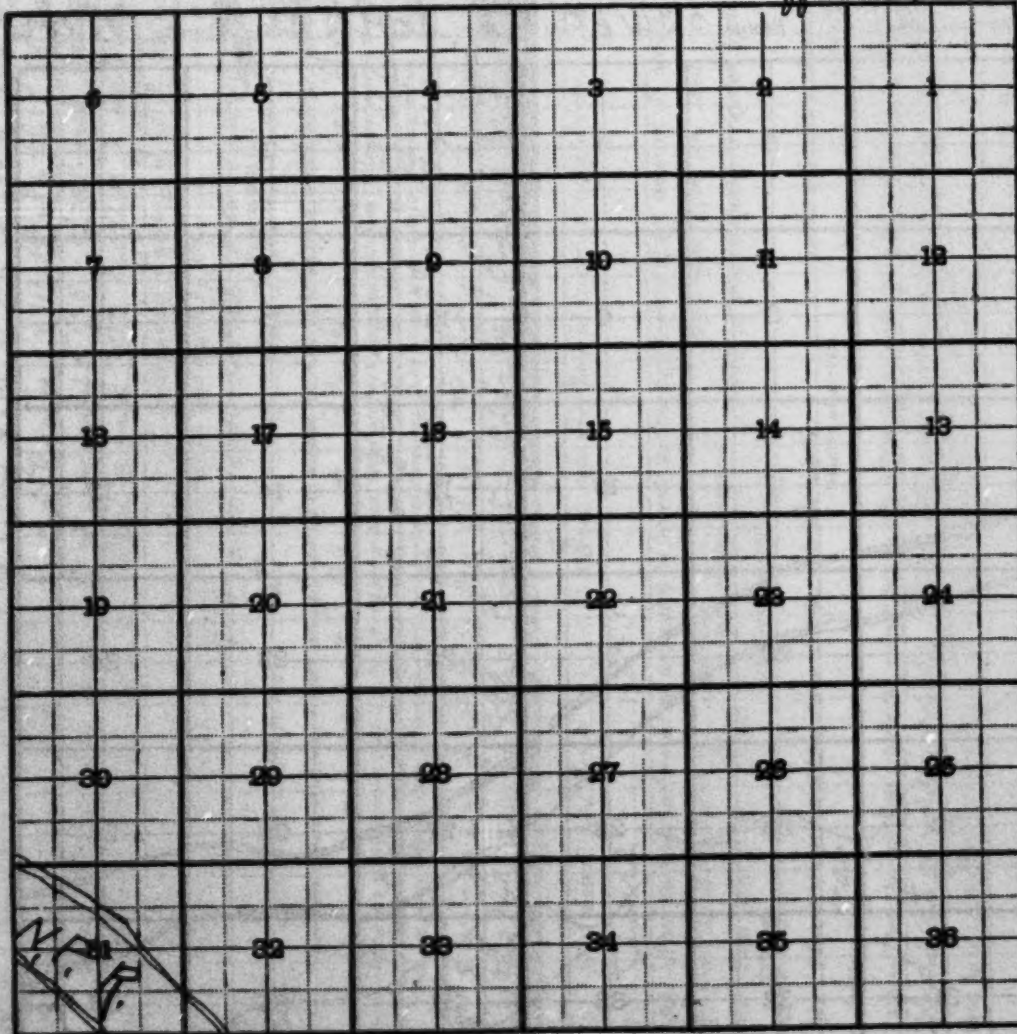


Township 21 N Range 53 W 6th P Mer. Scotts Bluff County Nebr

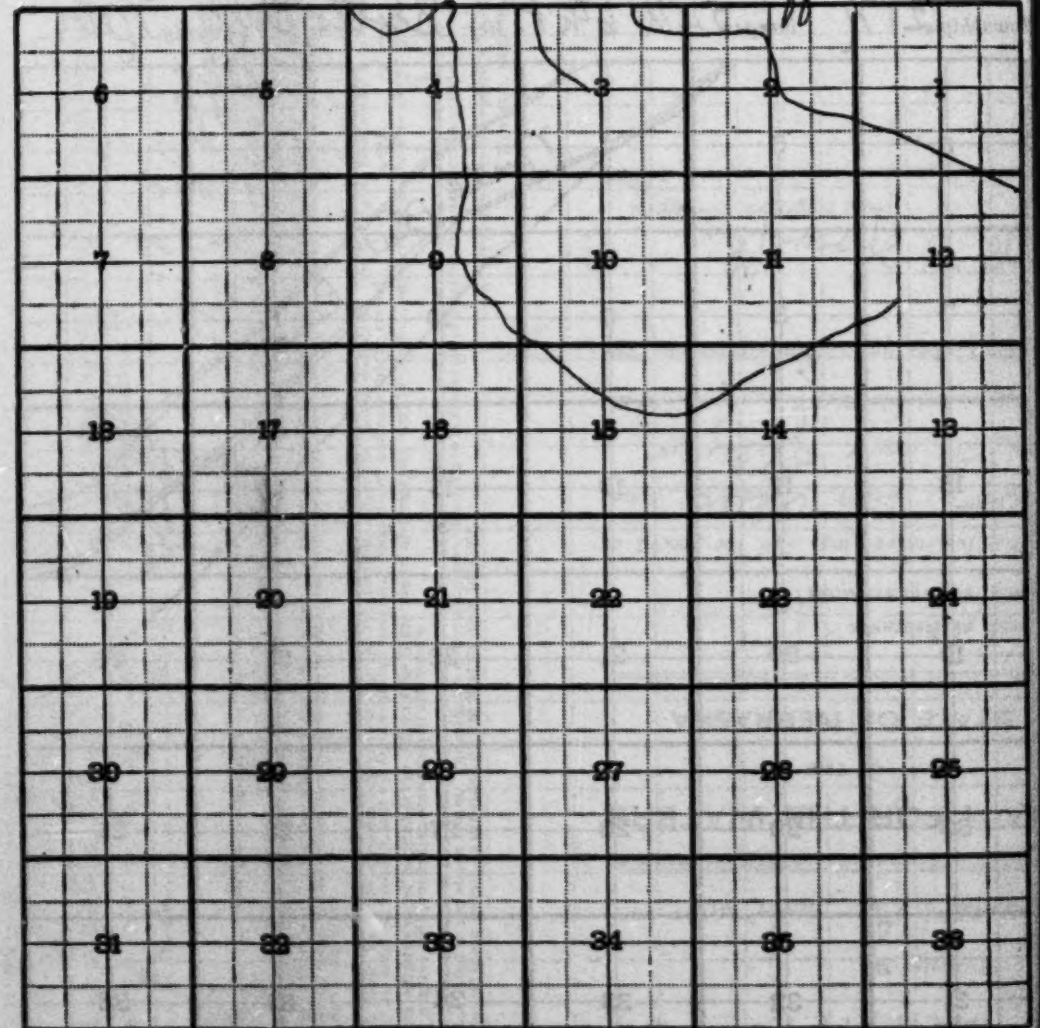


TOWNSHIP PLATS—Showing Line of Ditch or Canal

Township 21 Range 52W 6th³ Mer. Scotts Bluff County, Nebr.



Township 20 Range 53W 6th⁴ Mer. Scotts Bluff County, Nebr.



376 Sixtieth. That the blank claim received by The Castle Rock Irrigation Canal & Water Power Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 5th day of July, 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 377 and 378.)

379

Sixty-first. That the blank claim received by The Alliance Irrigation Canal & Water Power Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 17th day of July, 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 380 and 381.)

Water Division, No. _____ District, No. _____
(The above to be filled out at the office of Board)

Claim for the Waters of the State of Nebraska.

I, Martin L. Bullard of the town of Camp Clarke
County of Cheyenne State of Nebraska being duly sworn, upon my oath say:
(Name of person signing claim.) (City or Village of which a resident.)

1st.—That the name of the Claimant is Alliance Irrigation Canal & Water Power
(Name of Claimant.)
2d.—That the name of the Claimant is Alliance Irrigation Canal & Water Power
(Name of person for whom claim is made.)
3d.—That the name adopted for the ditch or canal is the Alliance Irrigation Canal
(Name of ditch or canal.)

Post Office Address, No. _____
Cheyenne County, Nebraska
(Suburb and Street.) (State.)

2d.—That the water is claimed for the purpose of Irrigation and for agricultural purposes
(State the purpose for which water is claimed.)
3d.—That the name adopted for the ditch or canal is the Alliance Irrigation Canal
(Name of ditch or canal.)

4th.—That the source of the appropriation claimed is The North Platte River
(Name of creek or river from which water is claimed.)

5th.—That the amount of the appropriation claimed is three hundred & seventy-five
(Number of cubic feet.)

6th.—That the headgate is located on the North or left bank of the stream, in
(Direction.)

NW 1/4 SW 1/4
(Section, Township, Range.)

7th.—That the said ditch or canal, fourteen miles in length, passes
(Number of miles.)

through the following sections of land, as shown on the accompanying township plat, viz: Sections (5) five, four (4)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

Sections: thirty-five (35) and thirty-six (36) and thirty-seven (37) and thirty-eight (38)
(Number of sections.)

two (2) and one (1) of Township (29) north of range (No. fifty-two) (52) West
(Township and Range.)

all of sections 18, 17, 16, 21, 22, 23 & 24 in T. 20 N of R. 70.5 W lying north of the North Platte river, SE $\frac{1}{4}$ & SW $\frac{1}{4}$ Sec. 6, SE $\frac{1}{4}$ & SW $\frac{1}{4}$ Sec. 5, SE $\frac{1}{4}$ & SW $\frac{1}{4}$ Sec. 4 & SE $\frac{1}{4}$ & SW $\frac{1}{4}$ Sec. 1 & SE $\frac{1}{4}$ & SW $\frac{1}{4}$ Sec. 2 NE $\frac{1}{4}$ & SE $\frac{1}{4}$ & SW $\frac{1}{4}$ of Sec. 10 SE $\frac{1}{4}$ & SW $\frac{1}{4}$ of Sec. 1 all Sec. 9, 9, 15, 14, 13, 12 of Township 20 north of Range 50 West, sections 17, 17, 16, 21, 22, 23 & 24 NE $\frac{1}{4}$ & SW $\frac{1}{4}$ of Sec. 19 in Township 20 North of Range 50 West of the Principal Meridian amounting in all to 14,151 acres.

	(Total number of acres)
Set of 6 th... Principal... 1000	10

1891- That the actual work of excavation and construction was begun on the first
day of December 1891, and the work will be completed, and the
appropriation perfected on or before the fourth day of April 1892
(were or will be.)

(a) That this claim is made, under and by virtue of rights deemed to have been acquired by posting a notice appropriation perfected on or before the fourteenth day of April, 1906 in the 26th of December said notice was issued by said company State whether by application of water to a beneficial use without objection, or by posting notice and filing same with County Clerk, as prescribed on the 26th day of December A.D. 1892; a copy of which said notice by law, if by use, date payable, date of commencement, and period of duration; if by filing, state date of posting notice, date of record, and where it was received, in record December 31st 1902 and it was recorded at _____.

was received on record September 1, 1912. ^{page 9} At Investigation Record on page 194 of the record of Cheyenne County State of Nebraska and mother was posted at the head of Camp. Dec. 26, 1892 as aforesaid.

(b) That water was turned into said ditch or canal on or before the 15th

day of May 1892

13th. — That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is Four (4) years from April 4th, 1895.

(c) That there were two hundred and eighty acres of crops actually irrigated from said ditch or canal during 1893 & about 1,000 acres of land irrigated

(d) That it is estimated that there will be Four hundred & twenty acres of crops irrigated from said ditch or canal during 1914 120 acres irrigated for hay; 10 for corn and several of crops irrigated.

canal during 1994 1200 acres irrigated for hay. (number of acres)
1995 1900 acres irrigated. This he about 1000 acres of crop irrigated.

14th.—That the petition which the subscriber to this affidavit bears to said ditch or canal, or other work, is that of—
During yr. of 1915 many are afraid to go down the ditch.
 President of Alliance Irrigation Canal & Water Power Company
 (State whether owner, manager, superintendent, etc.)

and that he is authorized to make this affidavit in behalf of the interests affected.

(State whether owner, manager, superintendent, etc.)

Martin L. Bullard.
(signature.)

State of Nebraska)

County of *Chenango* } 86.

and sworn to defend me by Martin d. Ballard.

one twenty seventh day of June 1893

Thomas W. O. Wells

[GRAY]

M. term of Commission expires July 2nd 1900

NOTICE.—The above claim affidavit must be signed and sworn to by some person closely related in interest, or having authority, delegated or otherwise, to make affidavit, to the ditch, canal, or other work in question; preferably by the owner or president, secretary, or manager of the company controlling same.

Two more care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken upon the ground by under Secretaries, to complete the record from which the Board will determine the rights and priority of the claimant. Therefore, generalities must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within 15 days from March 19 1913.

Proposed extensions and enlargements of canals, ditches, or other works not protected by new filings made previously to April 4th, 1895, must be included in the above claim. Individuals or corporations desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the Statute now in force.

STATE BOARD OF IRRIGATION,
R. B. HOWELL, State Engineer. Secretary.

CLAIM FOR THE WATERS
OF THE
STATE OF NEBRASKA

This instrument was filed for record at
Ten o'clock, 7th day of July, 1895
in the 17 day of July 1895
and duly recorded in Book _____ of the
Record of Claims for Appropriations on Page _____

R. B. Howell
State Engineer, Secretary.

TOWNSHIP PLATS—Showing Line of Ditch or Canal

The following township plats _____ in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

Signature of person signing application.

NOTICE—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 20 Range 52 Mer. 1 Sixth County Cheyenne Township 21 Range 52 Mer. 2 6th County Cheyenne

6	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

Sketch of River and Ditch

6	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

TOWNSHIP PLATS—Showing Line of Ditch or Canal

3

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

4

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

Claim for the Waters of the State of Nebraska.

I, James O. Hallgren of the Town of Bayard
(Name of person signing claim.) (City or Village of which a resident.)
County of Cheyenne State of Nebr. being duly sworn, upon my oath say:
(Name of County) (Name of State)

1st—That the name of the Claimant is The Napa Mule Company of Nevada Co.
(Name of County) (Name of State)
(Name of person or company for whom claim is made)

Post Office Address, No.

Post Office Address, No. Cheney (Number and Street) Nebraska County Bayard Street, Bayard (City or Village.)

2d. - That the water is claimed for the purpose of irrigation and water power (State.)
(State the purpose for which water is claimed.)

54.—That the name adopted for the ditch or canal is the The Nine Mile Canal
(Name of ditch or canal.)

474.—That the source of the appropriation claimed is *North Platte River* and *Reston Company*. (Name of creek or stream on which water is obtained.)

51a.—That the amount of the appropriation claimed is.....
(NAME OF CREEK OR RIVER FROM WHICH WATER IS CLAIMED)
.....
(Number of cubic feet.)

cubic feet per second of time.

6th—That the headgate is located on the North bank of the stream, in
cubic feet per second of time. SW⁴ of NE⁴ of SW⁴ of Section 18 East, Township 21, Range one
(Describe lot or forty acres in which situated.) (Number.) (Number.)

Range... of the (No) ... Principal Meridian.
(Number)

7th.—That the said ditch or canal, is Twenty-two ^(Number of Miles) 7 1/2 miles in length, passes through the following sections of land, as shown on the accompanying township plat, viz:

36 1/4 28 1/4 18 1/4 8 1/4 27 1/4 17 1/4 16 1/4 15 1/4 14 1/4 13 1/4 12 1/4 11 1/4 10 1/4 9 1/4 8 1/4 7 1/4 6 1/4 5 1/4 4 1/4 3 1/4 2 1/4 1 1/4 1/4 1/2 3/4 1 1 1/4 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100 101 102 103 104 105 106 107 108 109 110 111 112 113 114 115 116 117 118 119 120 121 122 123 124 125 126 127 128 129 130 131 132 133 134 135 136 137 138 139 140 141 142 143 144 145 146 147 148 149 150 151 152 153 154 155 156 157 158 159 160 161 162 163 164 165 166 167 168 169 170 171 172 173 174 175 176 177 178 179 180 181 182 183 184 185 186 187 188 189 190 191 192 193 194 195 196 197 198 199 200 201 202 203 204 205 206 207 208 209 210 211 212 213 214 215 216 217 218 219 220 221 222 223 224 225 226 227 228 229 230 231 232 233 234 235 236 237 238 239 240 241 242 243 244 245 246 247 248 249 250 251 252 253 254 255 256 257 258 259 260 261 262 263 264 265 266 267 268 269 270 271 272 273 274 275 276 277 278 279 280 281 282 283 284 285 286 287 288 289 290 291 292 293 294 295 296 297 298 299 300 301 302 303 304 305 306 307 308 309 310 311 312 313 314 315 316 317 318 319 320 321 322 323 324 325 326 327 328 329 330 331 332 333 334 335 336 337 338 339 340 341 342 343 344 345 346 347 348 349 350 351 352 353 354 355 356 357 358 359 360 361 362 363 364 365 366 367 368 369 370 371 372 373 374 375 376 377 378 379 380 381 382 383 384 385 386 387 388 389 390 391 392 393 394 395 396 397 398 399 400 401 402 403 404 405 406 407 408 409 410 411 412 413 414 415 416 417 418 419 420 421 422 423 424 425 426 427

(a) That the portion of said ditch or canal, Twelve and 3/4 miles in length, indicated on said plate by a black line is completed.

(b) That the portion of said ditch or canal, Nine 9 3/4 miles in length, indicated on said plats (Number of miles.)

8th. — That the dimensions of said ditch or canal are (and will be for the uncompleted portions) as follows: HEAD-

GATE—width in clear Forty feet; depth of water on floor at low water One feet
(Number of feet)

Location	Depth	Width on Bottom	Width on Top	Grade per Mile
Below Headgate	one	see forty	see Fifty eight	see $\frac{1}{2}$ sec
At $\frac{1}{2}$ mile	one $\frac{1}{2}$	see Twenty	see Thirty - four	see " "
At $\frac{1}{4}$ mile	Two	see Eight and	see Twenty - one	see " "
At $\frac{1}{2}$ mile	Two	see Twelve	see Twenty - one $\frac{1}{2}$	see " "
At $\frac{3}{4}$ mile	Two	see Ten	see Fifteen $\frac{1}{2}$	see " "
At Elbow	see	see	see	see " "
At $\frac{1}{2}$ mile	see	see	see	see " "

91A.—That the total excavation amounts to.....cubic yards of material, consisting of
(Number of yards)

Way of sand (State character of material, whether rock, boulders, sand, clay, etc.) and that the total length of fuming required is None sec.

(a) That the material thus far removed amounts to 127551 cubic yards.
(Number of feet) (Number of yards)

(b) That the suming completed amounts to feet.

10th.	That the estimated cost of said ditch or canal is as follows:	Earthwork, \$	1104.00
		Headgate, \$	157.00
		Other expenses, \$	136.97
		Total, \$	1397.97

(a) That the expenditures thus far incurred are as follows:

Headnote \$	15 00	Other expenses \$	105 75
		Total \$	120 75
		Earthwork \$	76 40
		Fluming, \$	10 10

[illegible]

all of Sect 5 North of River (about 400 acres) in T 20 R 5 E 2 S 1/2 of Dec 35 -
NW 1/4 of NW 1/4 of 33, 38 1/2 of NW of 35, 8 1/2 of 8 1/2 of NE 1/4 of 35 S 1/2 of 36, 21 of 32
S 1/2 of 24 1/2 of 30, 2 NW of 32, 8 1/2 of NW 1/4 of 31, NE 1/4 of 1, 2 of 20, 20 of 32
NE of 32, 8 1/2 of NE of 31, all of 32, T 21 R 5 E 1 NW 1/4 of 6, W 1/2 of NE
and North 1/2 of 32, 8 1/2 of 33, all of 7, all of 8, 8 1/2 of 5, 8 1/2 of 4,
NE 1/4 of 9, 8 1/2 of 9, 20 of 31 amounting in all to 11960 ^{acres} of
T 20 R 5 E 2 S 1/2 of Dec 35 - (Total number of acres) 15 1/4

1914--that the actual work of excavation and construction was begun on the day of Oct. 1 1913, and the work will be completed, and the appropriation perfected on or before the 15th day of April 1914. 189.5

(c) That this claim is made, under and by virtue of rights deemed to have been acquired by posting notice of filing with County Clerk Notice posted and
(State whether any application of water to a beneficial use without objection, or by posting notice and filing same with County Clerk, as prescribed Dec. 6th 1893, is filed for record Dec. 9, 1893 with County Clerk by law, If by use, state nature, date of commencement, and period of duration; if by filing, state date of posting notice, date of record, and where recorded.)
Dee. 9th 1893 Bluff Co. Ariz.

(recorded.)

(b) That water was turned into said ditch or canal on or before the filed
(Was, or will be)
day of May 1894

13th.—That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is Three years from April 4th, 1895.
(State number of years.)

(c) That there were 640 (State number of years.) acres of crops actually irrigated from said ditch or canal during 1894 (Number of acres.)

(d) That it is estimated that there will be 1500 acres of crops irrigated from said ditch or (Number of acres)

14th.—That the relation which the subscriber to this affidavit bears to said ditch or canal, or other work, is that of.....

and that he is authorized to make this affidavit in behalf of the interests affected.

(State whether owner, manager, superintendent, etc.)

Secretary

James O'Hallaren Sec.
(Signature.)

State of Neb. } ss.
County of Cheyenne }
and sworn to before me by James O'Halloran
this 9th day of August, 1895 -

Francis D. Warner
Notary Public.

NOTICE.—The above claim affidavit must be signed and sworn to by some person closely related in interest, (or having authority, delegated or otherwise, to make affidavit), to the ditch, canal, or other work in question; preferably by the owner or president, secretary, or manager of the company controlling same.

Too much care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken (up on the ground) by under Secretaries, to complete the record from which the Board will determine the rights and priority of the claimant. Therefore, generalities must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within days from De-
lay and neglect will jeopardize the rights of claimants,

Proposed extensions and enlargements of canals, ditches, or other works, not protected by new flings made previously to April 4th, 1895, must not be included in the above claim. Individuals or corporations, desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the Statute now in force.

STATE BOARD OF IRRIGATION.
R. R. HOWELL, State Engineer. Secretary.

CLAIM FOR THE WATERS
OF THE
STATE OF NEBRASKA

This instrument was filed for record at
 1 o'clock, P. M.
 on the 12 day of Aug., 19
 and duly recorded in Book _____ of the
 Record of Claims for Appropriations on Page _____

R.B. Howell,
State Engineer, Secretary.

REV. PRINT. ORD. NEW.

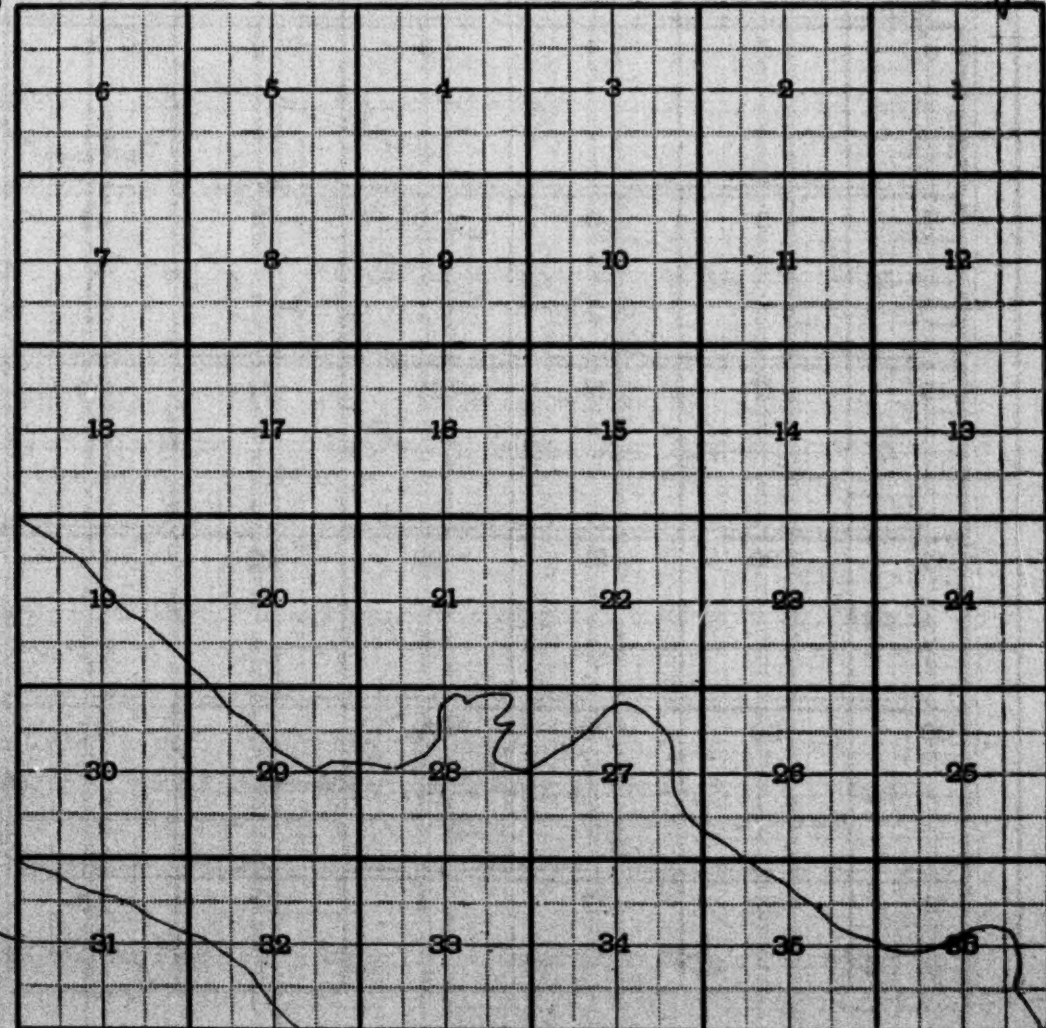
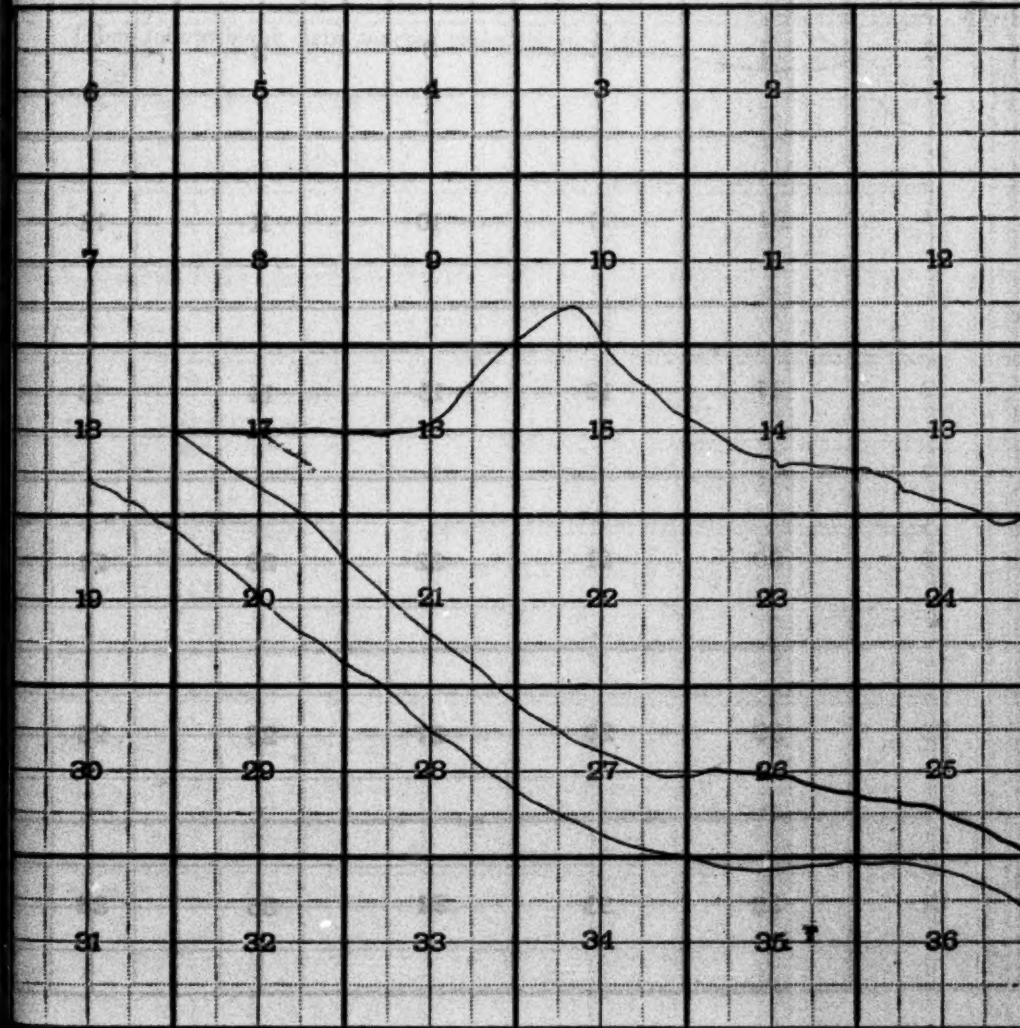
TOWNSHIP PLATS--Showing Line of Ditch or Canal

The following township plats, 5 in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

Nine mile Canal & Reservoir Co.
By E. M. Stearns Signature of person making application.

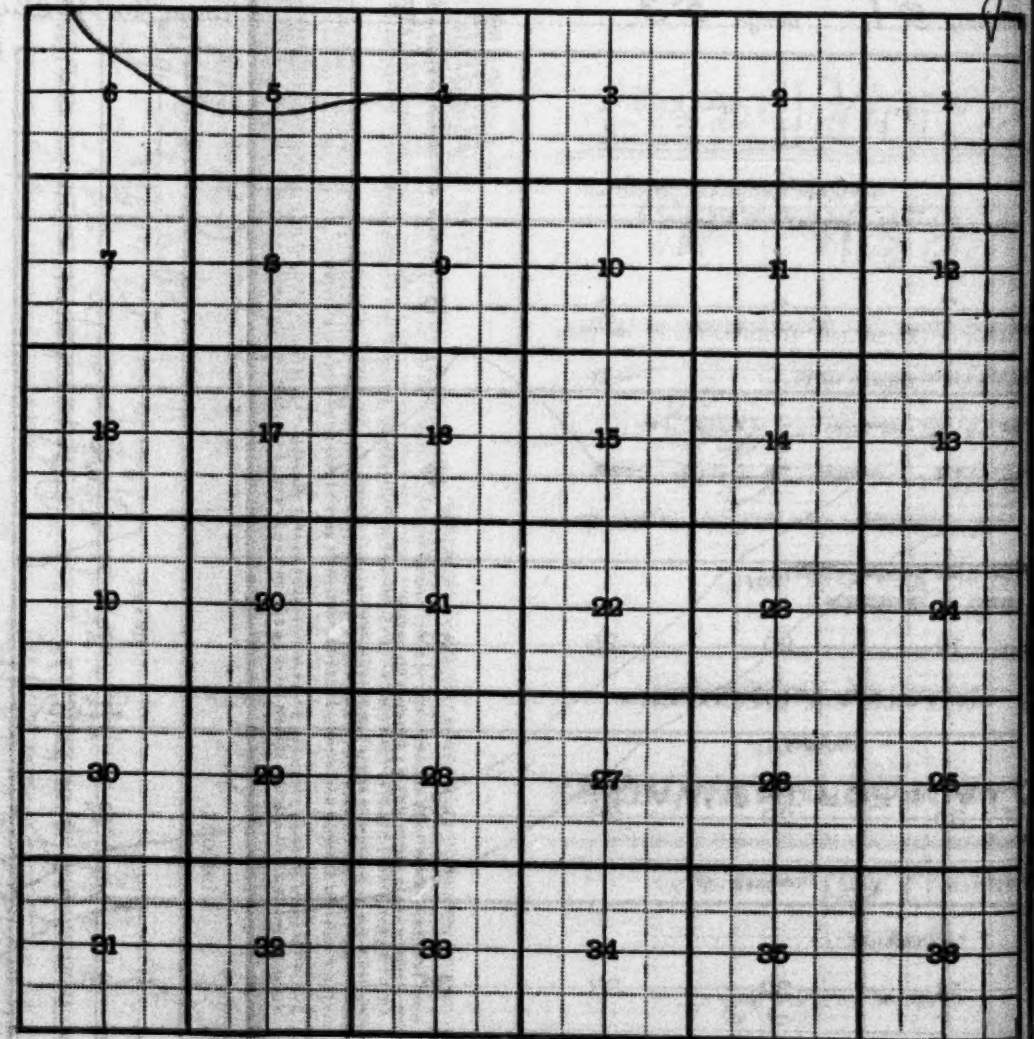
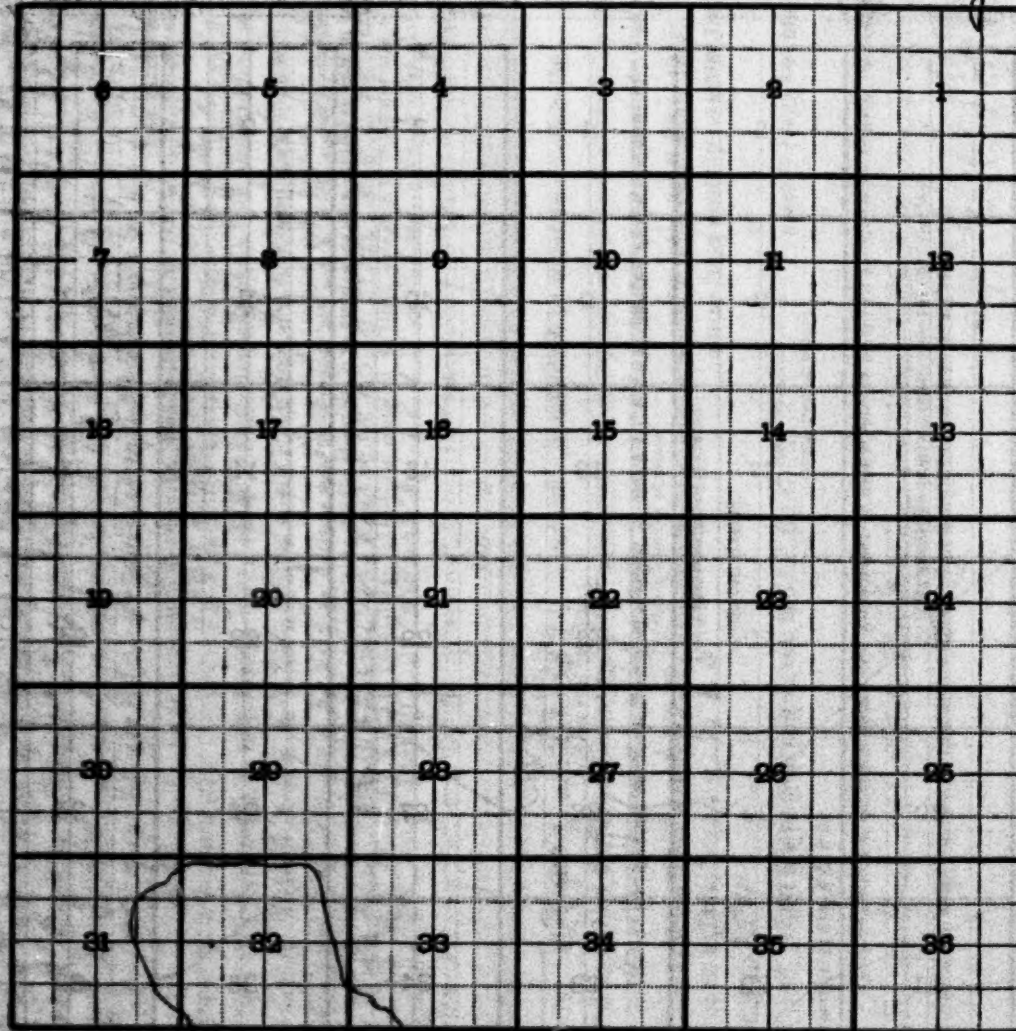
NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 21 Range 53 Mer. 1 County Scotts Bluff Township 21 Range 52 Mer. 1 County Cheyenne



TOWNSHIP PLATS—Showing Line of Ditch or Canal

Township 21 Range 51 Mer. 3 County Cheyenne Township 20 Range 51 Mer. 4 County Cheyenne



382 Sixty-second. That the blank claim received by The Nine Mile Canal & Reservoir Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 12th day of August, 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 383 and 384.)

385 Sixty-third. That the blank claim received by The Central Irrigation Canal & Water Power Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 13th day of August 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 386 and 387.)

Water Division, No. 1-2-3-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31-32-33-34-35-36-37-38-39-40-41-42-43-44-45-46-47-48-49-50-51-52-53-54-55-56-57-58-59-60-61-62-63-64-65-66-67-68-69-70-71-72-73-74-75-76-77-78-79-80-81-82-83-84-85-86-87-88-89-90-91-92-93-94-95-96-97-98-99-100-101-102-103-104-105-106-107-108-109-110-111-112-113-114-115-116-117-118-119-120-121-122-123-124-125-126-127-128-129-130-131-132-133-134-135-136-137-138-139-140-141-142-143-144-145-146-147-148-149-150-151-152-153-154-155-156-157-158-159-160-161-162-163-164-165-166-167-168-169-170-171-172-173-174-175-176-177-178-179-180-181-182-183-184-185-186-187-188-189-190-191-192-193-194-195-196-197-198-199-200-201-202-203-204-205-206-207-208-209-210-211-212-213-214-215-216-217-218-219-220-221-222-223-224-225-226-227-228-229-230-231-232-233-234-235-236-237-238-239-240-241-242-243-244-245-246-247-248-249-250-251-252-253-254-255-256-257-258-259-260-261-262-263-264-265-266-267-268-269-270-271-272-273-274-275-276-277-278-279-280-281-282-283-284-285-286-287-288-289-290-291-292-293-294-295-296-297-298-299-300-301-302-303-304-305-306-307-308-309-310-311-312-313-314-315-316-317-318-319-320-321-322-323-324-325-326-327-328-329-330-331-332-333-334-335-336-337-338-339-340-341-342-343-344-345-346-347-348-349-350-351-352-353-354-355-356-357-358-359-360-361-362-363-364-365-366-367-368-369-370-371-372-373-374-375-376-377-378-379-380-381-382-383-384-385-386-387-388-389-390-391-392-393-394-395-396-397-398-399-400-401-402-403-404-405-406-407-408-409-410-411-412-413-414-415-416-417-418-419-420-421-422-423-424-425-426-427-428-429-430-431-432-433-434-435-436-437-438-439-440-441-442-443-444-445-446-447-448-449-450-451-452-453-454-455-456-457-458-459-460-461-462-463-464-465-466-467-468-469-470-471-472-473-474-475-476-477-478-479-480-481-482-483-484-485-486-487-488-489-490-491-492-493-494-495-496-497-498-499-500-501-502-503-504-505-506-507-508-509-510-511-512-513-514-515-516-517-518-519-520-521-522-523-524-525-526-527-528-529-530-531-532-533-534-535-536-537-538-539-540-541-542-543-544-545-546-547-548-549-550-551-552-553-554-555-556-557-558-559-560-561-562-563-564-565-566-567-568-569-570-571-572-573-574-575-576-577-578-579-580-581-582-583-584-585-586-587-588-589-590-591-592-593-594-595-596-597-598-599-600-601-602-603-604-605-606-607-608-609-610-611-612-613-614-615-616-617-618-619-620-621-622-623-624-625-626-627-628-629-630-631-632-633-634-635-636-637-638-639-640-641-642-643-644-645-646-647-648-649-650-651-652-653-654-655-656-657-658-659-660-661-662-663-664-665-666-667-668-669-670-671-672-673-674-675-676-677-678-679-680-681-682-683-684-685-686-687-688-689-690-691-692-693-694-695-696-697-698-699-700-701-702-703-704-705-706-707-708-709-710-711-712-713-714-715-716-717-718-719-720-721-722-723-724-725-726-727-728-729-730-731-732-733-734-735-736-737-738-739-740-741-742-743-744-745-746-747-748-749-750-751-752-753-754-755-756-757-758-759-760-761-762-763-764-765-766-767-768-769-770-771-772-773-774-775-776-777-778-779-780-781-782-783-784-785-786-787-788-789-790-791-792-793-794-795-796-797-798-799-800-801-802-803-804-805-806-807-808-809-810-811-812-813-814-815-816-817-818-819-820-821-822-823-824-825-826-827-828-829-830-831-832-833-834-835-836-837-838-839-840-841-842-843-844-845-846-847-848-849-850-851-852-853-854-855-856-857-858-859-860-861-862-863-864-865-866-867-868-869-870-871-872-873-874-875-876-877-878-879-880-881-882-883-884-885-886-887-888-889-890-891-892-893-894-895-896-897-898-899-900-901-902-903-904-905-906-907-908-909-910-911-912-913-914-915-916-917-918-919-920-921-922-923-924-925-926-927-928-929-930-931-932-933-934-935-936-937-938-939-940-941-942-943-944-945-946-947-948-949-950-951-952-953-954-955-956-957-958-959-960-961-962-963-964-965-966-967-968-969-970-971-972-973-974-975-976-977-978-979-980-981-982-983-984-985-986-987-988-989-990-991-992-993-994-995-996-997-998-999-1000-1001-1002-1003-1004-1005-1006-1007-1008-1009-1010-1011-1012-1013-1014-1015-1016-1017-1018-1019-1020-1021-1022-1023-1024-1025-1026-1027-1028-1029-1030-1031-1032-1033-1034-1035-1036-1037-1038-1039-1040-1041-1042-1043-1044-1045-1046-1047-1048-1049-1050-1051-1052-1053-1054-1055-1056-1057-1058-1059-1060-1061-1062-1063-1064-1065-1066-1067-1068-1069-1070-1071-1072-1073-1074-1075-1076-1077-1078-1079-1080-1081-1082-1083-1084-1085-1086-1087-1088-1089-1090-1091-1092-1093-1094-1095-1096-1097-1098-1099-1100-1101-1102-1103-1104-1105-1106-1107-1108-1109-1110-1111-1112-1113-1114-1115-1116-1117-1118-1119-1120-1121-1122-1123-1124-1125-1126-1127-1128-1129-1130-1131-1132-1133-1134-1135-1136-1137-1138-1139-1140-1141-1142-1143-1144-1145-1146-1147-1148-1149-1150-1151-1152-1153-1154-1155-1156-1157-1158-1159-1160-1161-1162-1163-1164-1165-1166-1167-1168-1169-1170-1171-1172-1173-1174-1175-1176-1177-1178-1179-1180-1181-1182-1183-1184-1185-1186-1187-1188-1189-1190-1191-1192-1193-1194-1195-1196-1197-1198-1199-1200-1201-1202-1203-1204-1205-1206-1207-1208-1209-1210-1211-1212-1213-1214-1215-1216-1217-1218-1219-1220-1221-1222-1223-1224-1225-1226-1227-1228-1229-1230-1231-1232-1233-1234-1235-1236-1237-1238-1239-1240-1241-1242-1243-1244-1245-1246-1247-1248-1249-1250-1251-1252-1253-1254-1255-1256-1257-1258-1259-1260-1261-1262-1263-1264-1265-1266-1267-1268-1269-1270-1271-1272-1273-1274-1275-1276-1277-1278-1279-1280-1281-1282-1283-1284-1285-1286-1287-1288-1289-1290-1291-1292-1293-1294-1295-1296-1297-1298-1299-1300-1301-1302-1303-1304-1305-1306-1307-1308-1309-1310-1311-1312-1313-1314-1315-1316-1317-1318-1319-1320-1321-1322-1323-1324-1325-1326-1327-1328-1329-1330-1331-1332-1333-1334-1335-1336-1337-1338-1339-1340-1341-1342-1343-1344-1345-1346-1347-1348-1349-1350-1351-1352-1353-1354-1355-1356-1357-1358-1359-1360-1361-1362-1363-1364-1365-1366-1367-1368-1369-1370-1371-1372-1373-1374-1375-1376-1377-1378-1379-1380-1381-1382-1383-1384-1385-1386-1387-1388-1389-1390-1391-1392-1393-1394-1395-1396-1397-1398-1399-1400-1401-1402-1403-1404-1405-1406-1407-1408-1409-1410-1411-1412-1413-1414-1415-1416-1417-1418-1419-1420-1421-1422-1423-1424-1425-1426-1427-1428-1429-1430-1431-1432-1433-1434-1435-1436-1437-1438-1439-1440-1441-1442-1443-1444-1445-1446-1447-1448-1449-1450-1451-1452-1453-1454-1455-1456-1457-1458-1459-1460-1461-1462-1463-1464-1465-1466-1467-1468-1469-1470-1471-1472-1473-1474-1475-1476-1477-1478-1479-1480-1481-1482-1483-1484-1485-1486-1487-1488-1489-1490-1491-1492-1493-1494-1495-1496-1497-1498-1499-1500-1501-1502-1503-1504-1505-1506-1507-1508-1509-1510-1511-1512-1513-1514-1515-1516-1517-1518-1519-1520-1521-1522-1523-1524-1525-1526-1527-1528-1529-1530-1531-1532-1533-1534-1535-1536-1537-1538-1539-1540-1541-1542-1543-1544-1545-1546-1547-1548-1549-1550-1551-1552-1553-1554-1555-1556-1557-1558-1559-1560-1561-1562-1563-1564-1565-1566-1567-1568-1569-1570-1571-1572-1573-1574-1575-1576-1577-1578-1579-1580-1581-1582-1583-1584-1585-1586-1587-1588-1589-1590-1591-1592-1593-1594-1595-1596-1597-1598-1599-1600-1601-1602-1603-1604-1605-1606-1607-1608-1609-1610-1611-1612-1613-1614-1615-1616-1617-1618-1619-1620-1621-1622-1623-1624-1625-1626-1627-1628-1629-1630-1631-1632-1633-1634-1635-1636-1637-1638-1639-1640-1641-1642-1643-1644-1645-1646-1647-1648-1649-1650-1651-1652-1653-1654-1655-1656-1657-1658-1659-1660-1661-1662-1663-1664-1665-1666-1667-1668-1669-1670-1671-1672-1673-1674-1675-1676-1677-1678-1679-1680-1681-1682-1683-1684-1685-1686-1687-1688-1689-1690-1691-1692-1693-1694-1695-1696-1697-1698-1699-1700-1701-1702-1703-1704-1705-1706-1707-1708-1709-1710-1711-1712-1713-1714-1715-1716-1717-1718-1719-1720-1721-1722-1723-1724-1725-1726-1727-1728-1729-1730-1731-1732-1733-1734-1735-1736-1737-1738-1739-1740-1741-1742-1743-1744-1745-1746-1747-1748-1749-1750-1751-1752-1753-1754-1755-1756-1757-1758-1759-1760-1761-1762-1763-1764-1765-1766-1767-1768-1769-1770-1771-1772-1773-1774-1775-1776-1777-1778-1779-1780-1781-1782-1783-1784-1785-1786-1787-1788-1789-1790-1791-1792-1793-1794-1795-1796-1797-1798-1799-1800-1801-1802-1803-1804-1805-1806-1807-1808-1809-1810-1811-1812-1813-1814-1815-1816-1817-1818-1819-1820-1821-1822-1823-1824-1825-1826-1827-1828-1829-1830-1831-1832-1833-1834-1835-1836-1837-1838-1839-1840-1841-1842-1843-1844-1845-1846-1847-1848-1849-1850-1851-1852-1853-1854-1855-1856-1857-1858-1859-1860-1861-1862-1863-1864-1865-1866-1867-1868-1869-1870-1871-1872-1873-1874-1875-1876-1877-1878-1879-1880-1881-1882-1883-1884-1885-1886-1887-1888-1889-1890-1891-1892-1893-1894-1895-1896-1897-1898-1899-1900-1901-1902-1903-1904-1905-1906-1907-1908-1909-1910-1911-1912-1913-1914-1915-1916-1917-1918-1919-1920-1921-1922-1923-1924-1925-1926-1927-1928-1929-1930-1931-1932-1933-1934-1935-1936-1937-1938-1939-1940-1941-1942-1943-1944-1945-1946-1947-1948-1949-1950-1951-1952-1953-1954-1955-1956-1957-1958-1959-1960-1961-1962-1963-1964-1965-1966-1967-1968-1969-1970-1971-1972-1973-1974-1975-1976-1977-1978-1979-1980-1981-1982-1983-1984-1985-1986-1987-1988-1989-1990-1991-1992-1993-1994-1995-1996-1997-1998-1999-2000-2001-2002-2003-2004-2005-2006-2007-2008-2009-2010-2011-2012-2013-2014-2015-2016-2017-2018-2019-2020-2021-2022-2023-2024-2025-2026-2027-2028-2029-2030-2031-2032-2033-2034-2035-2036-2037-2038-2039-2040-2041-2042-2043-2044-2045-2046-2047-2048-2049-2050-2051-2052-2053-2054-2055-2056-2057-2058-2059-2060-2061-2062-2063-2064-2065-2066-2067-2068-2069-2070-2071-2072-2073-2074-2075-2076-2077-2078-2079-2080-2081-2082-2083-2084-2085-2086-2087-2088-2089-2090-2091-2092-2093-2094-2095-2096-2097-2098-2099-2100-2101-2102-2103-2104-2105-2106-2107-2108-2109-2110-2111-2112-2113-2114-2115-2116-2117-2118-2119-2120-2121-2122-2123-2124-2125-2126-2127-2128-2129-2130-2131-2132-2133-2134-2135-2136-2137-2138-2139-2140-2141-2142-2143-2144-2145-2146-2147-2148-2149-2150-2151-2152-2153-2154-2155-2156-2157-2158-2159-2160-2161-2162-2163-2164-2165-2166-2167-2168-2169-2170-2171-2172-2173-2174-2175-2176-2177-2178-2179-2180-2181-2182-2183-2184-2185-2186-2187-2188-2189-2190-2191-2192-2193-2194-2195-2196-2197-2198-2199-2200-2201-2202-2203-2204-2205-2206-2207-2208-2209-2210-2211-2212-2213-2214-2215-2216-2217-2218-2219-2220-2221-2222-2223-2224-2225-2226-2227-2228-2229-2230-2231-2232-2233-2234-2235-2236-2237-2238-2239-2240-2241-2242-2243-2244-2245-2246-2247-2248-2249-2250-2251-2252-2253-2254-2255-2256-2257-2258-2259-2260-2261-2262-2263-2264-2265-2266-2267-2268-2269-2270-2271-2272-2273-2274-2275-2276-2277-2278-2279-2280-2281-2282-2283-2284-2285-2286-2287-2288-2289-2290-2291-2292-2293-2294-2295-2296-2297-2298-2299-2300-2301-2302-2303-2304-2305-2306-2307-2308-2309-2310-2311-2312-2313-2314-2315-2316-2317-2318-2319-2320-2321-2322-2323-2324-2325-2326-2327-2328-2329-2330-2331-2332-2333-2334-2335-2336-2337-2338-2339-2340-2341-2342-2343-2344-2345-2346-2347-2348-2349-2350-2351-2352-2353-2354-2355-2356-2357-2358-2359-2360-2361-2362-2363-2364-2365-2366-2367-2368-2369-2370-2371-2372-2373-2374-2375-2376-2377-2378-2379-2380-2381-2382-2383-2384-2385-2386-2387-2388-2389-2390-2391-2392-2393-2394-2395-2396-2397-2398-2399-2400-2401-2402-2403-2404-2405-2406-2407-2408-2409-2410-2411-2412-2413-2414-2415-2416-2417-2418-2419-2420-2421-2422-2423-2424-2425-2426-2427-2428-2429-2430-2431-2432-2433-2434-2435-2436-2437-2438-2439-2440-2441-2442-2443-2444-2445-2446-2447-2448-2449-2450-2451-2452-2453-2454-2455-2456-2457-2458-2459-2460-2461-2462-2463-2464-2465-2466-2467-2468-2469-2470-2471-2472-2473-2474-2475-2476-2477-2478-2479-2480-2481-2482-2483-2484-2485-2486-2487-2488-2489-2490-2491-2492-2493-2494-2495-2496-2497-2498-2499-2500-2501-2502-2503-2504-2505-2506-2507-2508-2509-2510-2511-2512-2513-2514-2515-2516-2517-2518-2519-2520-2521-2522-2523-2524-2525-2526-2527-2528-2529-2530-2531-2532-2533-2534-2535-2536-2537-2538-2539-2540-2541-2542-2543-2544-2545-2546-2547-2548-2549-2550-2551-2552-2553-2554-2555-2556-2557-2558-2559-2560-2561-2562-2563-2564-2565-2566-2567-2568-2569-2570-2571-2572-2573-2574-2575-2576-2577-2578-2579-2580-2581-2582-2583-2584-2585-2586-2587-2588-2589-2590-2591-2592-2593-2594-2595-2596-2597-2598-2599-2600-2601-2602-2603-2604-2605-2606-2607-2608-2609-2610-2611-2612-2613-2614-2615-2616-2617-2618-2619-2620-2621-2622-2623-2624-2625-2626-2627-2628-2629-2630-2631-2632-2633-2634-2635-2636-2637-263

Claim for the Waters of the State of Nebraska.

I, Arnon E. Stoner (Name of person making claim.) of the Village of Jering (City or Village in which a resident.)
 County of Scotts Bluff State of Nebraska being duly sworn, upon my oath say:
 1st.—That the name of the Claimant is the Central Irrigation Canal & Water Power Company (Name of County)
 2nd.—That the name of the Claimant is the Central Irrigation Canal & Water Power Company (Name of person or company for whom claim is made.)
 Street, Jering (City or Village.)
 Post Office Address, No. _____

Scotts Bluff County, Nebraska (County.)
 2d.—That the water is claimed for the purpose of Irrigation Water Power and other useful and beneficial purposes. (State the purpose for which water is claimed.)
 3d.—That the name adopted for the ditch or canal is the Central Irrigation Canal and Water Power Company (Name of ditch or canal.)
 4th.—That the source of the appropriation claimed is the North Platte River (Name of creek or river from which water is claimed.)
 5th.—That the amount of the appropriation claimed is one hundred and twenty (Number of cubic feet.)
 cubic feet per second of time.

6th.—That the headgate is located on the South bank of the stream, in the NE 4 & E 4 North, South, East, or West.
the NE 4 & E 4 of Section 21, Township 22 (Number.)
 Range 5-3 of the 6th Principal Meridian. (Number.)
 7th.—That the said ditch or canal, Four miles in length, passes through the following sections of land, as shown on the accompanying township plat, viz:

27, 28, 35 & 36 in Tp. 22 R. 55 Section 1 Tp 21-1853
Sections 6-7 & 8 in Tp 21 R 54,
Sections 6-7 & 8 in Tp 21 R 54,

(a) That the portion of said ditch or canal, Four miles in length, indicated on said plat by a black line is completed.
 (b) That the portion of said ditch or canal, Three miles in length, indicated on said plat by a red line is not completed.

8th.—That the dimensions of said ditch or canal are (and will be for the uncompleted portions) as follows: HEAD-GATE—width in clear 50 feet; depth of water on floor at low water 2 feet.

Location	Depth	Width on Bottom	Width on Top	Grade per Mile
Below Headgate <u>cut 8</u>	feet	feet	feet	feet
At 1st mile <u>4</u>	feet	feet	feet	feet
At 2nd mile <u>2</u>	feet	feet	feet	feet
At 3rd mile <u>2</u>	feet	feet	feet	feet
At 4th mile <u>2</u>	feet	feet	feet	feet
At _____ mile _____	feet	feet	feet	feet
At _____ mile _____	feet	feet	feet	feet

9th.—That the total excavation amounts to Finished cubic yards of material, consisting of Rock at headgate sand and earth (Give character of material, whether rock, boulders, sand, clay, etc.)
 and that the total length of filling required is none feet.

(a) That the material thus far removed amounts to Finished (Number of feet.)
 (b) That the summing completed amounts to no feet.
 10th. That the estimated cost of said ditch or canal is as follows: Earthwork, \$ 6,400 Total, \$ 8,000
 Fuming, \$ no Headgate, \$ 1,600 Other expenses, \$ _____
 (a) That the expenditures thus far incurred are as follows: Earthwork, \$ 3,400 Fuming, \$ no
 Headgate, \$ 1,600 Other expenses, \$ _____ Total, \$ 5,000

11th.—That it is the intention that the said ditch or canal shall supply water to irrigate the following sections or quarters sections of land, viz: lying between said canal and the North Platte River
tract: Sections 27, 28, 35 & 36 Tp 21 R 55 Section 1
Sections 6-7 & 8 in Tp 21 R 54,
Sections 6-7 & 8 in Tp 21 R 54,

1p 21 P 54 and portions of said sections that may be irrigated from the south or east side of said canal

amounting in all to 257.7 acres.
12th.—That the actual work of excavation and construction was begun on the 1st day of May 1890, and the works were completed, and the appropriation perfected on or before the 1st day of May 1892.

(a) That this claim is made, under and by virtue of rights deemed to have been acquired by Purchase from Mutual Irrigation Company and the application of said State whether by application of water to beneficial use without objection, or by posting notice and filing same with County Clerk, as prescribed by law. If by use, state nature, date of commencement, and period of duration; if by filing, state date of posting notice, date of record, and where recorded. That the water was turned into said ditch or canal on or before the 1st day of July 1890.

(b) That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is 1 year (State number of years.)
(c) That there were 428 acres of crops actually irrigated from said ditch or canal during 1894.

(d) That it is estimated that there will be 630 acres of crops irrigated from said ditch or canal during 1895.

14th.—That the relation which the subscriber to this affidavit bears to said ditch or canal, or other work, is that of one of the stockholders in said company or Secretary thereof and that he is authorized to make this affidavit in behalf of the interests affected.

Aaron E. Stoner,
(Signature.)

State of Nebraska,
County of Scotts Bluff ss.
and sworn to before me by The above named Aaron E. Stoner,
this 27 day of August 1895

(Seal) My Com. expires Jan. 30, 1901.
G. W. Gardner, Notary Public.

NOTICE.—The above claim, affidavit must be signed and sworn to by some person closely related in interest, (or having authority, delegated or otherwise, to make affidavit,) to the ditch, canal, or other work in question; preferably by the owner or president, secretary, or manager of the company controlling same.

Too much care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken (up on the ground) by under Secretaries, to complete the record from which the Board will determine the rights and priority of the claimant. Therefore, generalities must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within days from De-
lay and neglect will jeopardize the rights of claimants.
Proposed extensions and enlargements of canals, ditches, or other works, not protected by new filings made previously to April 4th, 1895, must not be included in the above claim. Individuals or corporations, desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the Statute now in force.

STATE BOARD OF IRRIGATION,
R. B. HOWELL, State Engineer, Secretary.

Claim, No. 246
Priority, No. 14
Division, No. 14
CLAIM FOR THE WATERS
OF THE
STATE OF NEBRASKA

State of Nebraska
This State Board of Irrigation
This instrument was filed for record at
11 o'clock, A.M. of Aug 19
the 31st day of Aug 19
and duly recorded in Book
of Claims for Appropriations on Page
R. B. Howell
State Engineer, Secretary.
Aaron W. R. Allen

TOWNSHIP PLATS—Showing Line of Ditch or Canal

The following township plats, one in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

Carroll Nicholls

Signature of person signing application.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plat No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 23N Range 58W Mer. 6 County Scotts Bluff Township 23N Range 57 Mer. 6 County Scotts Bluff

6	5	4	3	2	1
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	32	33	34	35	36

6	5	4	3	2	1
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	32	33	34	35	36

Sketch of River & Ditch

TOWNSHIP PLATS--Showing Line of Ditch or Canal

3

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

4

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

(The above to be filled out at the office of Board)

Claim for the Waters of the State of Nebraska.

1. Robert J. Harshman of the P.O. of Gering
(Name of person claiming claim.)
 County of Scott Bluff State of Nebraska being duly sworn, upon oath say:
(Name of County) (Name of State)
 1st.—That the name of the claimant is Winter Creek Draining Company
(Name of person or company for whom claim is made.)
 Post Office Address, No. _____ City or Village, _____
Scotts Bluff County, Nebraska
(Number and Street) (State.)
 2d.—That the water claimed for the purpose of draining manufacturing, milling
and other useful purposes
(State the purpose for which water is claimed.)
 3d.—That the name adopted for the ditch or canal is the Winter Creek Canal
(Name of ditch or canal.)

4th.—That the source of the appropriation claimed is North Platte River
(Name of creek or river from which water is claimed.)

5th.—That the amount of the appropriation claimed is 172'2"
(Number of cubic feet.)

6th.—That the headgate is located on the North bank of the stream, in
NW⁴ of SE 4 of Section 17, Township 22
(Describe lot or forty acre in which situated.) (Number.)
 Range 25 W of the 6th Principal Meridian.
(Number East or West) (Number.)

7th.—That the said ditch or canal, Twelve miles in length, passes
(Number of Miles.)
 through the following sections of land, as shown on the accompanying township plat, viz:
Sections 17, 16, 15, 22, 23, 14, 13, 24 in Tp. 22 R 54
(Describe each section through which canal passes, stating Township and Range.)

Sections 19, 20, 21, 28, 27, 26, 35 in Tp. 22 R 54

(a) That the portion of said ditch or canal, Twelve (12) miles in length, indicated
(Number of miles.)
 on said plat by a black line is completed.

(b) That the portion of said ditch or canal, No miles in length, indicated on said plat
(Number of miles.)
 by a red line is not completed.

8th.—That the dimensions of said ditch or canal are (and will be for the uncompleted portions) as follows: HEAD-
 GATE—width in clear 36 feet; depth of water on floor at low water
1.9 feet.
(Number of feet) (Depth in feet)

Location	Depth	Width on Bottom	Width on Top	Grade per Mile
Below Headgate	<u>5.5</u> feet	<u>40</u> feet	<u>51</u> feet	<u>1.58</u> feet
At <u>1.3</u> mile	<u>3.0</u> feet	<u>24</u> feet	<u>30</u> feet	<u>1.58</u> feet
At <u>1</u> mile	<u>3.0</u> feet	<u>24</u> feet	<u>30</u> feet	<u>2.11</u> feet
At <u>6</u> mile	<u>2.5</u> feet	<u>20</u> feet	<u>25</u> feet	<u>2.11</u> feet
At <u>7.5</u> mile	<u>2.5</u> feet	<u>16</u> feet	<u>21</u> feet	<u>2.11</u> feet
At <u>9</u> mile	<u>2.5</u> feet	<u>8</u> feet	<u>13</u> feet	<u>2.11</u> feet
At <u>12</u> mile	<u>2.5</u> feet	<u>8</u> feet	<u>13</u> feet	<u>2.1</u> feet

9th.—That the total excavation amounts to 100,500 cubic yards of material, consisting of
Sand and Clay
(Give dimensions at each point where reduced in size, stating miles from headgate) (Number of yards)
(State character of material, whether rock, boulders, sand, clay, etc.)

(a) That the material thus far removed amounts to 100,500 none feet.
(Number of feet)
 and that the total length of fluming required is _____ cubic yards.

(b) That the fluming completed amounts to none feet.
(Number of feet)

10th. That the estimated cost of said ditch or canal is as follows: Earthwork, \$ 10700.00 Total, \$ 12200.00
 Fluming, \$ _____
 Headgate, \$ 1000.00 Other expenses, \$ 500.00

(a) That the expenditures thus far incurred are as follows: Earthwork, \$ 10700.00 Fluming, \$ _____
 Headgate, \$ 1000.00 Other expenses, \$ 500.00 Total, \$ 12200.00

11th.—That it is the intention that the said ditch or canal shall supply water to irrigate the following sections or quarter-

sections of land, viz: All the land lying between said canal
of the North Platte river and section 20, 21, 22, 23, 24, 25
17-16-14-13-26-27 in Tp. 22 R 54 W Sections 19-20-21
26-27-28-29-30-31-32-33-34-35-36 in Tp. 21 R 54
(Give sections and quarter sections, stating number Township and Range.)

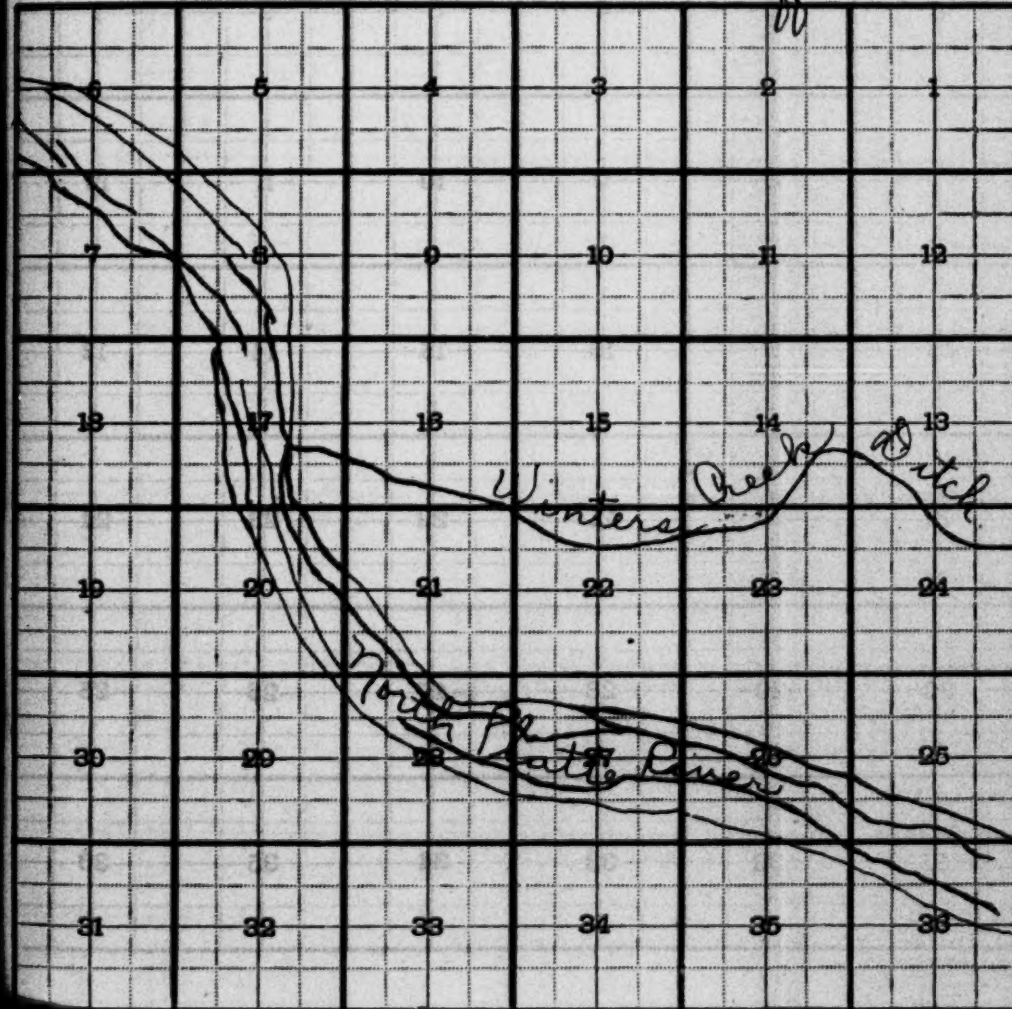
TOWNSHIP PLATS—Showing Line of Ditch or Canal

The following township plats, 2 in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

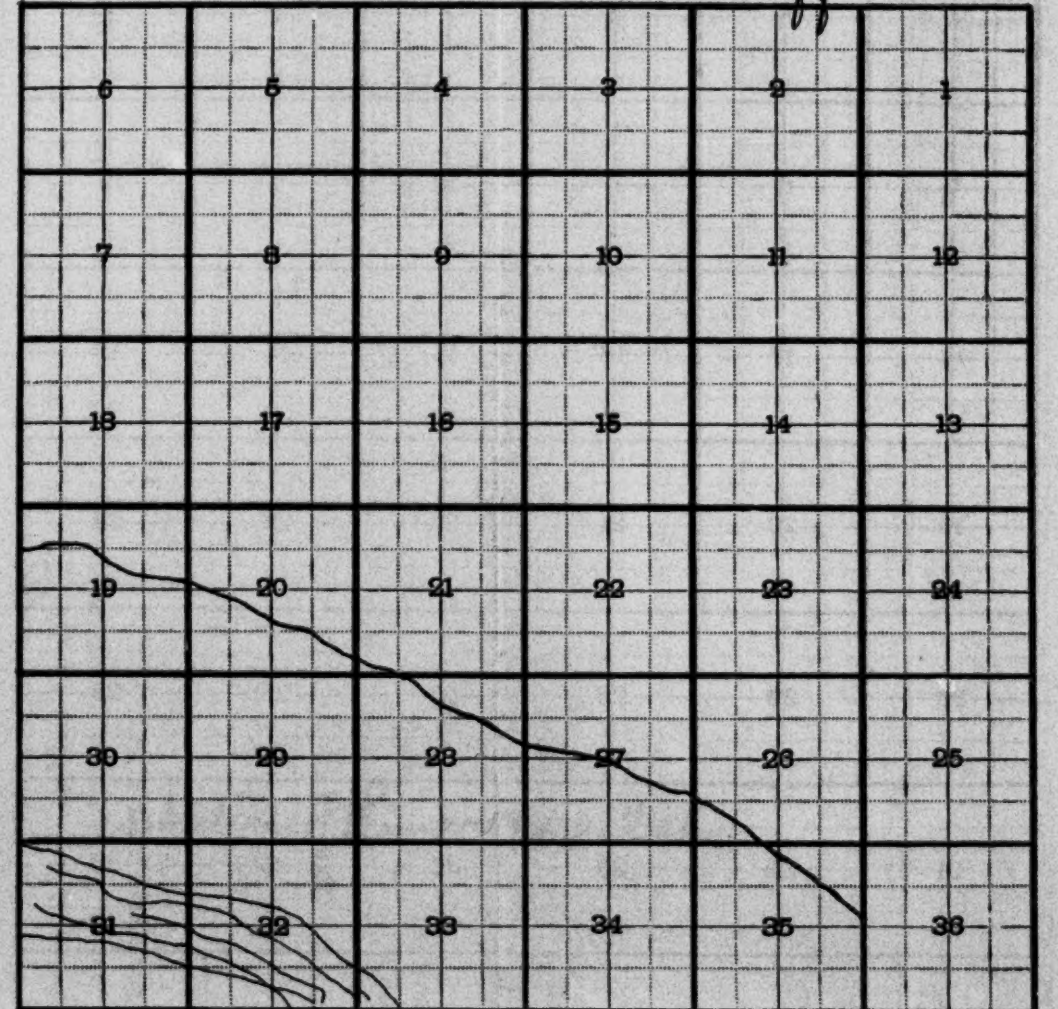
Robert J Harshman Sec.
Signature of person signing application.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plat No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 22 Range 55 ¹ Mer. Scotts Bluff County Nebr.



Township 22 Range 54 ² Mer. Scotts Bluff County Nebr.



TOWNSHIP PLATS—Showing Line of Ditch or Canal

3

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
29	28	23	27	26	25
31	32	33	34	35	36

4

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
29	28	23	27	26	25
31	32	33	34	35	36

388 Sixty-fourth. That the blank — received by The Winters Creek Irrigation Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 20th day of September 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 389 and 390.)

391 Sixty-fifth. That the blank claim received by The Belmont Irrigation Canal & Water Power Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 30th day of September 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 392 and 393.)

(The above to be filled out at the office of Board)

(The above to be filled out at the office of Board.)

(City or Village of which a resident.)

duky sicut, upon my oath sa

any for whom claim is made?

.....
(City or Village.)

West. H. 100. 2

for which water is claimed.)

me of ditch or canal.)

river from which water is claimed.)

river from which water is claimed.)

Number of cubic feet.)

cubic feet per second of time.

6th—That the headgate is located on the

20th Township

(Number.)

in.

miles in length. names.

us. viz:

14. 21
(id. and Range.)

IP, and Range.)

8-27-34-35436 ✓ 1927 149W

8-9-16-15-22-23924

1-34-26925-7182

—

(Number of miles.)

(Number of miles.)

by a red line is not completed.

DETTA en l'anno 1880.

[illegible]

(from headgate)

(Number of yards)

State character of material whether such material comes from the

and that the total length of flying received is

...cubic yards.

[illegible]

6

~~At - m - 911~~

Flaming, S.....

20

mal as shown but

as follows and

21.2, 23, 24, 25, 26, 27

334 34 all of 3043.2

24 all of section:

23 211 214 278 34-354

25, 24, 23, 22, 21, 20, 19, 18, 17, 16, 15, 14, 13, 12, 11, 10, 9, 8, 7, 6, 5, 4, 3, 2, 1, 0

USA

TOWNSHIP PLATS--Showing Line of Ditch or Canal

The following township plats, _____ in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

Signature of person signing application.

NOTICE.--The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

1

Township _____ Range _____ Mer. _____ County _____

6	5	4	3	2	1
7	8	9	10	11	12
13	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

2

Township _____ Range _____ Mer. _____ County _____

6	5	4	3	2	1
7	8	9	10	11	12
13	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

TOWNSHIP PLATS--Showing Line of Ditch or Canal

3

Township.....Range.....Mer.....County.....

0	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
29	29	28	27	26	25
31	32	33	34	35	36

4

Township.....Range.....Mer.....County.....

6	5	4	3	2	1
7	8	9	10	11	12
13	17	18	15	14	13
19	20	21	22	23	24
29	29	28	27	26	25
31	32	33	34	35	36

Claim for the Waters of the State of Nebraska.

1. Carroll, Nicholas, York, Nicholas Collins
(City or Village of which a resident.)
 County of Scott Bluff (Name of County.) State of Nebraska (State.) being duly sworn, upon my oath say:
 1st.—That the name of the Carroll, Nicholas and Carroll, Nicholas
(Name of person or company for whom claim is made.)

Post Office Address, No. Street, Collins
(City or Village.)
Scott Bluff County, Nebraska
(County.)

2d.—That the water claimed for the purpose of Irrigation & Water Power
(State the purpose for which water is claimed.)

3d.—That the name adopted for the ditch or canal is the Carroll Ditch Co
(Name of ditch or canal.)

4th.—That the source of the appropriation claimed is North Platte River
(Name of creek or river from which water is claimed.)

5th.—That the amount of the appropriation claimed is 264
(Number of cubic feet.)
 cubic feet per second of time.

6th.—That the headgate is located on the North Bank
(North, South, East or West.)
North East corner of Section 24, Township 23
(Describe lot or lots acres in which situated.) (Number.)

Range 58 of the 6th Principal Meridian.
(Number.)

7th.—That the said ditch or canal, 6 1/2 miles in length, passes
(Number of Miles.)

through the following sections of land, as shown on the accompanying township plate, viz:

Sec. 18	23	57
" 19	" 23	" 57
" 20	" 23	" 57
" 21	" 23	" 57
" 22	" 23	" 57
" 14	" 23	" 57

(a) That the portion of said ditch or canal, 6 1/2 miles in length, indicated
(Number of miles.)
 on said plate by a black line is completed.

(b) That the portion of said ditch or canal, _____ miles in length, indicated on said plate
(Number of miles.)
 by a red line is not completed.

8th.—That the dimensions of said ditch or canal are (and will be for the uncompleted portions) as follows: HEAD-
 GATE width in clear 16 feet; depth of water on floor at low water
(Number of feet.)

Location	Depth	Width on Bottom	Width on Top	Cut per Mile
Below Headgate	7	16	30	2
At 607 ft. mile	4	16	24	2
At 149 ft. mile	2	12	16	1 1/2
At 199 ft. mile	3	10	14	5
At 224 ft. mile	2 1/2	8	12	3
At 6 1/2 mile	1 1/2	6	9	3
At _____ mile	_____	_____	_____	_____

9th.—That the total excavation amounts to 60500 estimated cubic yards of material, consisting of
Clay gravel and sand
(State character of material, whether rock, boulders, sand, clay, etc.)

(a) That the material thus far removed amounts to 60500 estimated cubic yards.
(Number of feet.)

(b) That the summing completed amounts to _____ feet.
(Number of feet.)

10th.—That the estimated cost of said ditch or canal is as follows: Earthwork, \$ 6050
 Fluming, \$ _____ Headgate, \$ 400 Other expenses, \$ 800 Total, \$ 7250

(a) That the expenditures thus far incurred are as follows: Earthwork, \$ 6050 Fluming, \$ _____
 Headgate, \$ 400 Other expenses, \$ 800 Total, \$ 7250

11th.—That it is the intention that the said ditch or canal shall supply water to irrigate the following sections or quarter-

sections of land, viz:
NE 1/4 Sec 19 T23 R27
SW 1/4 " 20 " 23 " 27
SE 1/4 " 20 " 23 " 27
SW 1/4 " 20 " 23 " 27

And 300 acres more or less in lots lying along River Bank

[illegible]

amounts in all to 3250 acres.
(Total number of acres) 3250

191A.—That the actual work of excavation and construction was begun on the _____ day of _____ 1893, and the work _____ (were or will be) _____ day of _____ 1893—
(Total number of acres) _____ 1.27 apl _____ completed, and the _____

appropriation) perfected on or before the 1st day of April, 1895—
(Were or will be.)
(a) That this claim is made, under and by virtue of rights deemed to have been acquired by By filing application
+ posting notice & filing with Co. Clerk
(State whether by application of which to a principal use without objection, or by posting notice and filing same with County Clerk, as prescribed
by law. If by posting notice, date of posting notice, date of filing, date of posting notice, date of record, and where
recorded at Germany section Bluff County, Nebraska
in Investigation Recorder,

(b) That water was turned into said ditch or canal on or before the day of May (Was. or will) 1894

15th.—That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is 2 or 3 years from April 4th, 1895.
(State number of years.)

(c) That there were 300 (State number of years) acres of crops actually irrigated from said ditch or canal (Number of acres.) during 1994

(d) That it is estimated that there will be 3000 acres of crops irrigated from said ditch or canal during 1896 (Number of acres)

14th. -- That the relation which the subscriber to this affidavit bears to said ditch or canal, or other work, is that of President

and that he is authorized to make this affidavit in behalf of the interest affected.

By Carrott Nicholas
President

State of _____ } ss.
County of _____ }
and sworn to before me by _____
this 14th day of October, 1893 —
President

2.2

(SEAL)

F. A. Wright

Notary Public.

NOTICE.—The above claim affidavit must be signed and sworn to by some person closely related in interest, (or having authority, delegated or otherwise, to make said affidavit,) to the ditch, canal, or other work in question: preferably by the owner or president, secretary, or manager of the company controlling same.

Too much care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken (up on the ground) by under Secretaries to complete the record from which the Board will determine the rights and priority of the claimant. Therefore generalities must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within days from Delays and neglect will jeopardize the rights of claimants.

Proposed extensions and enlargements of canals, ditches, or other works, not protected by new filings made previously to April 4th, 1895, must not be included in the above claim. Individuals or corporations, desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the Statute now in force.

STATE BOARD OF IRRIGATION,
R. B. HOWELL, State Engineer, Secretary.

STATE OF NEBRASKA
OF THE
CLAIM FOR THE WATERS

Claim, No. 276
Priority, No.
District, No. 12

State of Nebraska
County of _____
I, _____, Clerk of said Court, do hereby certify that the foregoing is a true and correct copy of the original as the same appears from the records of said Court.

F. B. Howell
State Engineer, Secretary.

For Mr. J. Adams,

TOWNSHIP PLATS--Showing Line of Ditch or Canal

The following township plat, One in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

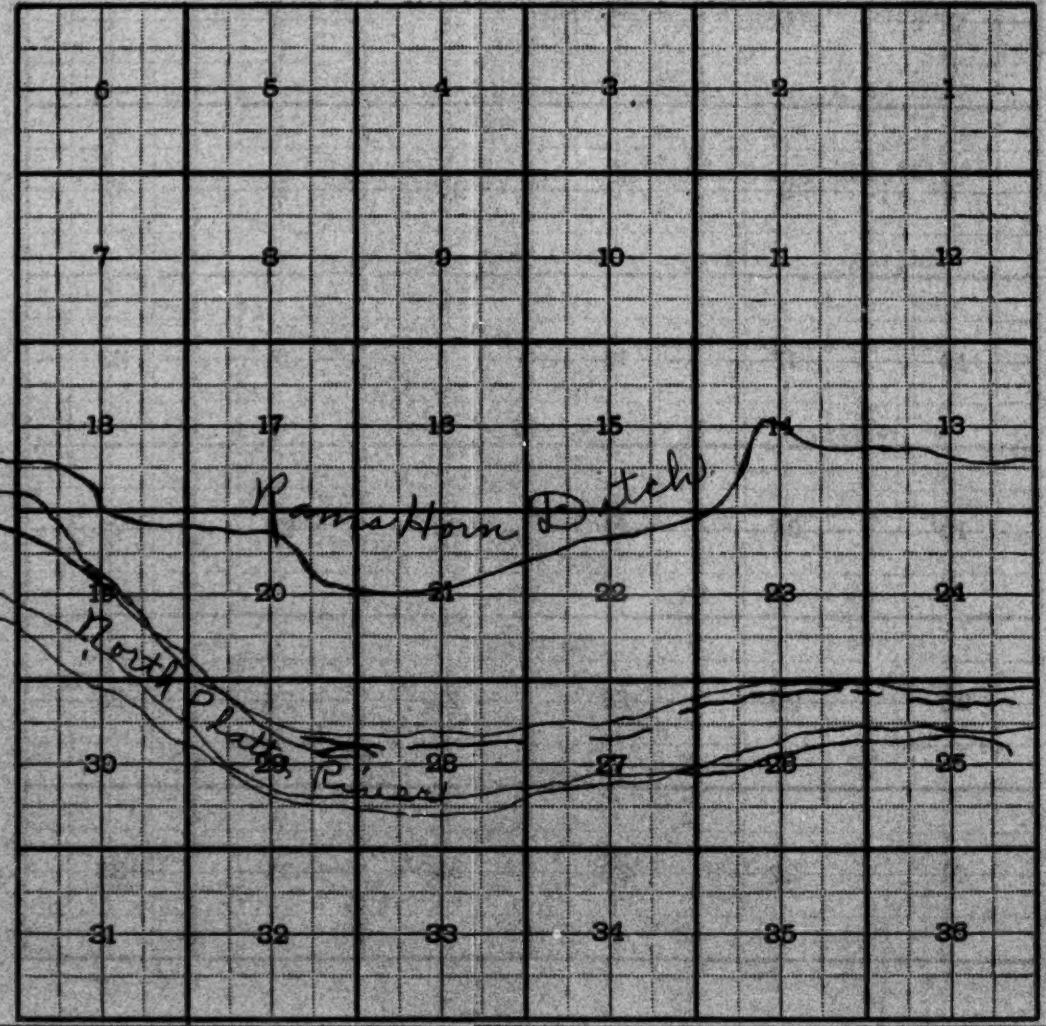
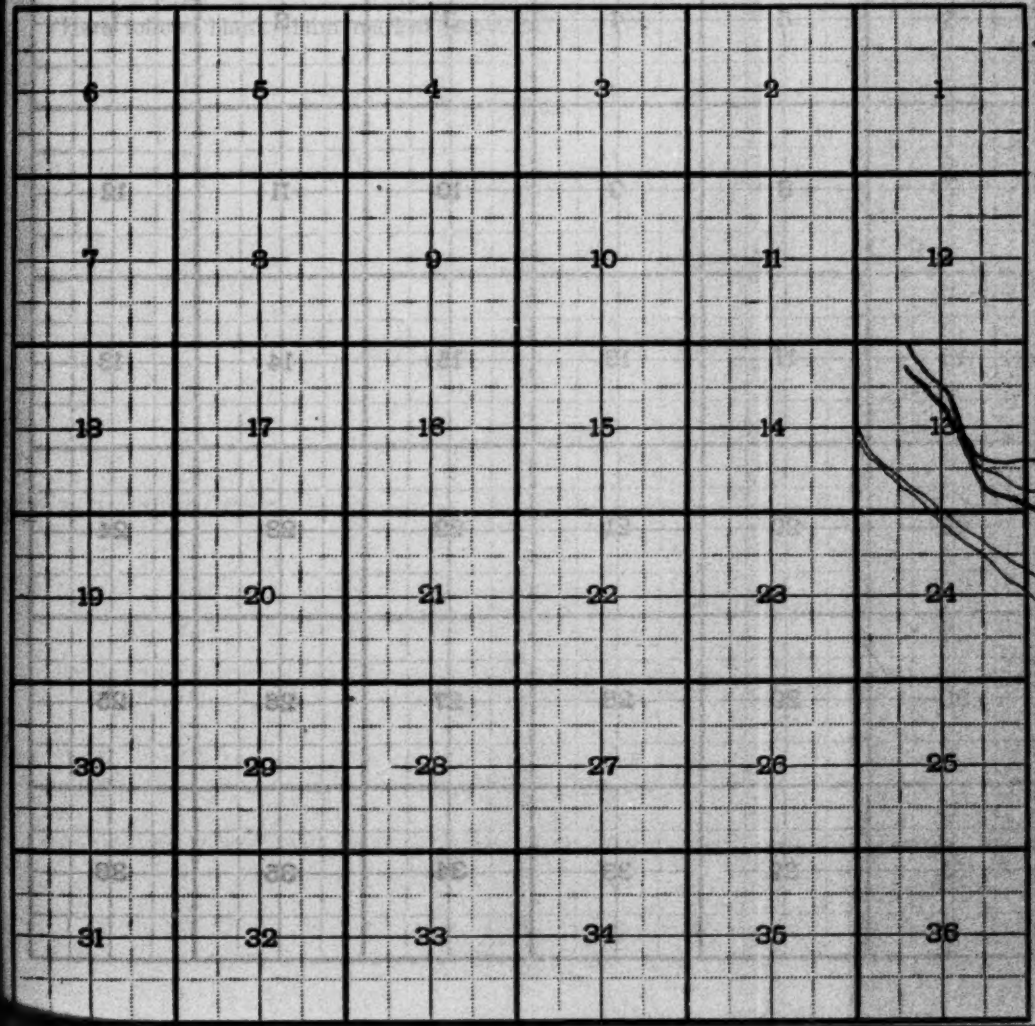
Carroll Nicholls

Signature of person signing application.

NOTICE--The blanks for No. of Township, Range, etc., at top of blank plat, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 237 Range 58 W. ¹ Mer. 6 County Scotts Bluff

Township 23 Range 57 ² Mer. 6 County Scotts Bluff



TOWNSHIP PLATS—Showing Line of Ditch or Canal

3
 Township.....Range.....Mer.....County.....

1	2	3	4	5	6
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	32	33	34	35	36

4
 Township.....Range.....Mer.....County.....

1	2	3	4	5	6
7	8	9	10	11	12
13	14	15	16	17	18
19	20	21	22	23	24
25	26	27	28	29	30
31	32	33	34	35	36

394 Sixth-sixth. That the blank claim received by The Ramshorn Ditch Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 6th day of October, 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 395 and 396.)

397 Sixty-seventh. That the blank claim received by The Enterprise Ditch Company from the Secretary of the State Board of Irrigation, was filled out by an officer of said Company and returned to the office of the Secretary of the State Board of Irrigation and filed in said office on the 15th day of October 1895, which said claim, when filled out and filed in the office of the Secretary of the State Board of Irrigation, was in words and figures following, to-wit:

(Here follows blank claim marked pages 398 and 399.)

TOWNSHIP PLATS—Showing Line of Ditch or Canal

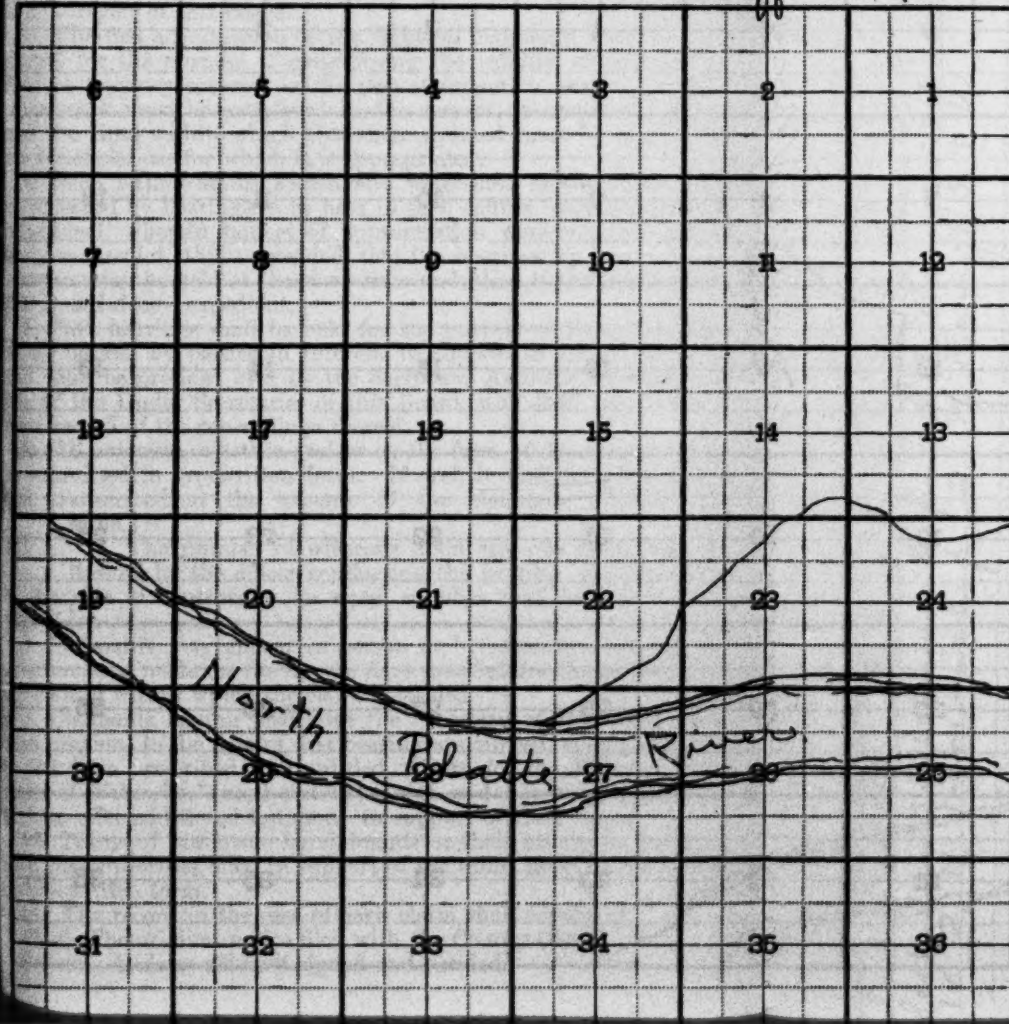
The following township plate, Four in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.
(No. filled out)

Ed Scriven

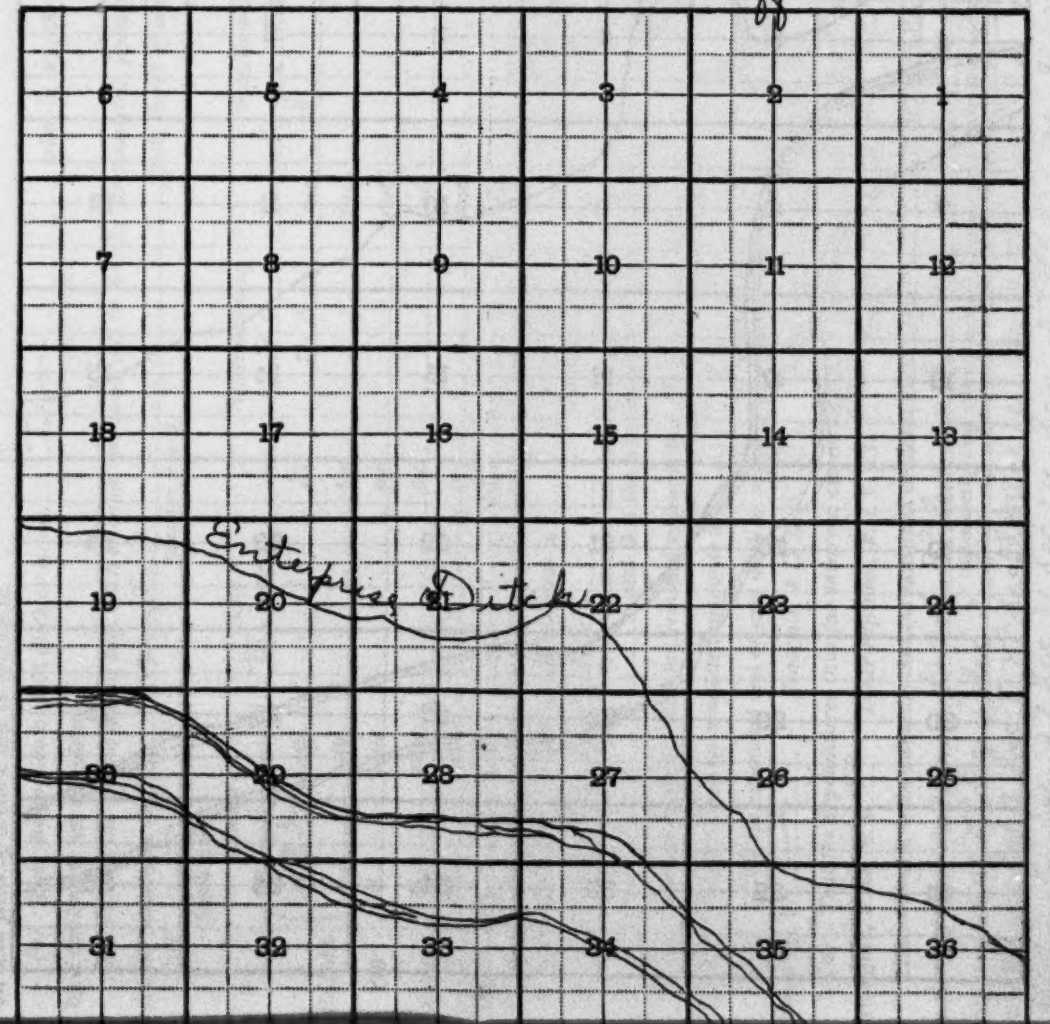
Signature of person signing application.

NOTICE—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

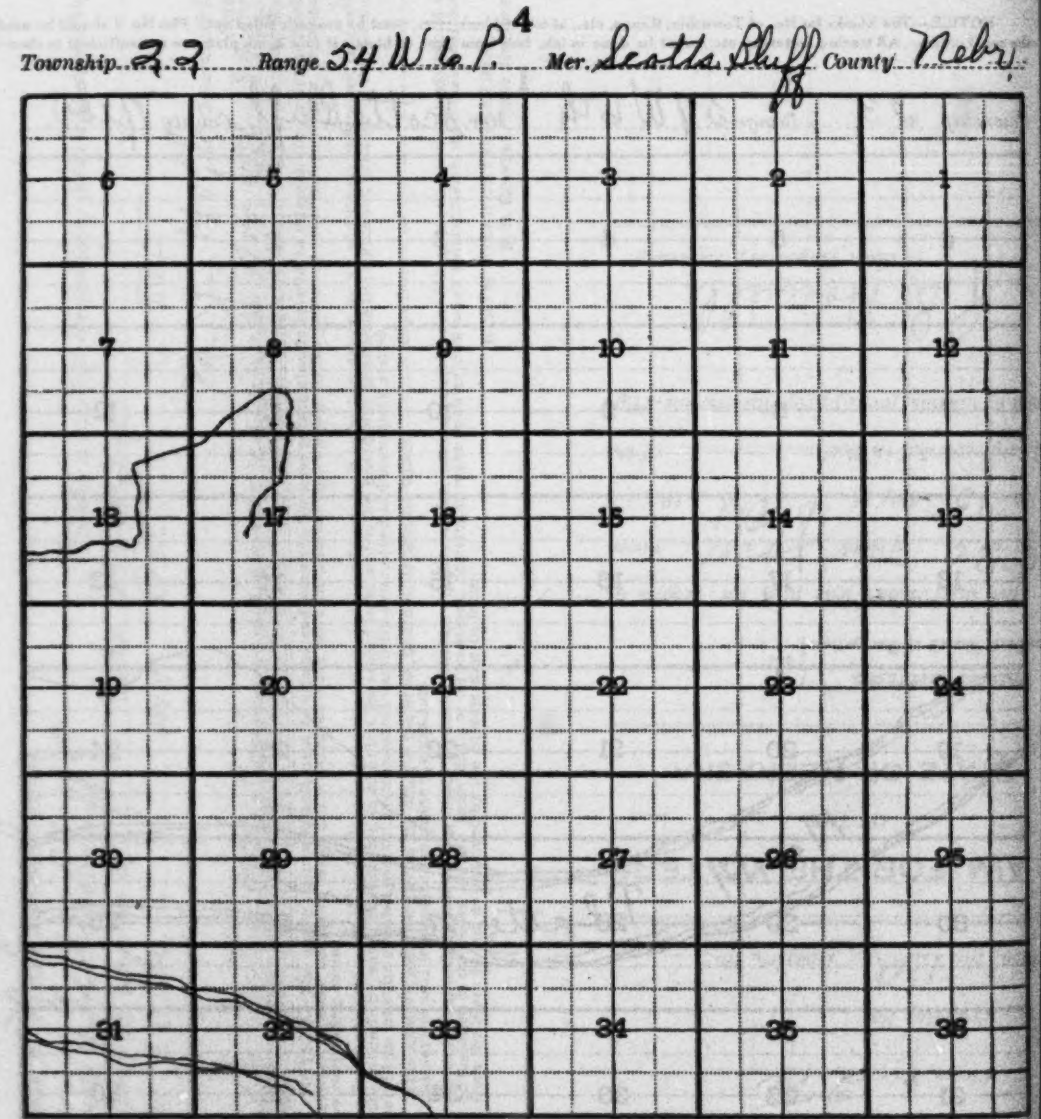
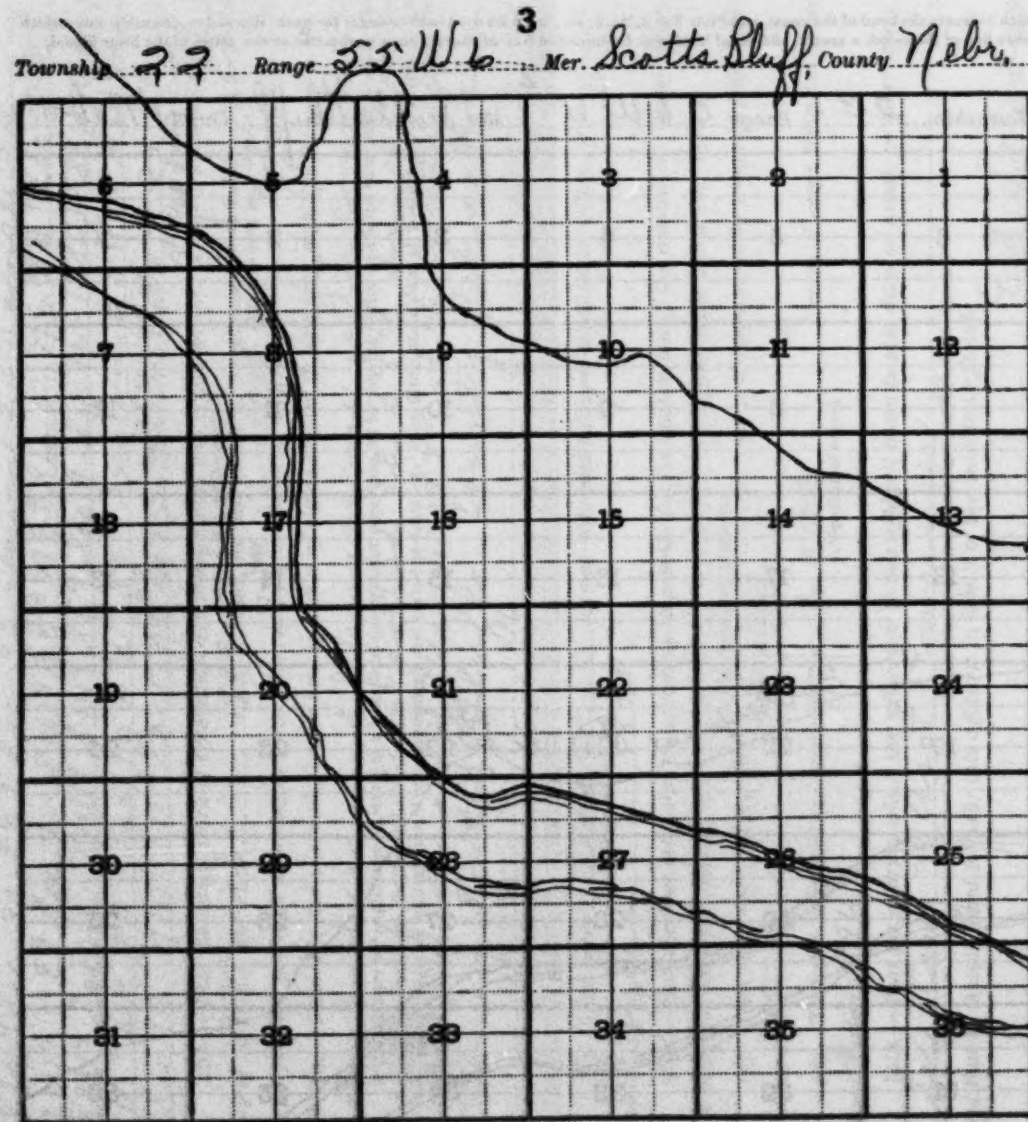
Township 23 Range 57W 6th¹ Mer. Scotts Bluff County Nebr.



Township 23 Range 56W 6² Mer. Scotts Bluff County Nebr.



TOWNSHIP PLATS—Showing Line of Ditch or Canal



400 67½. That on the 20th day of August 1895, at a meeting of the members of the State Board of Irrigation, with a full Board present, the following resolution was adopted:

1. "The rights to the use of water claimed within the water-shed of the Republican river shall be first adjudicated by the Board and that the other water-sheds of the State shall be taken up in such order as the secretary may deem expedient.

2. The adjudication of the rights claimed to the use of the public waters of the state for irrigation and other useful purposes, as provided by the irrigation law approved April 4, 1895, shall be conducted by water-sheds of the state as defined by the State Engineer and Secretary of this Board.

3. The first adjudication of the rights of claimants, shall be conducted for the purpose of determining the validity of claims; the land or territory covered, in the case of irrigation canals; the date when work must be completed, in the case of uncompleted canals; and the time within which the water claimed must be applied to the beneficial use for which it is appropriated.

4. Such adjudications within any water-shed of the state, shall be preceded by hearings to be held in each county, comprising such water-shed, wherein notices of appropriation were recorded previously to April 4, 1895; provided, that the hearings for two or more counties may be held at the same time and place if the secretary of this Board deems expedient.

5. Said hearings shall be held for the purpose of receiving testimony offered by parties in interest, in support of rights claimed; and shall be presided over by the Secretary, Assistant Secretary, or one of the Under Secretaries of this Board, who shall keep a complete record of the proceedings thereof.

6. All evidence, whether oral or in the form of depositions, shall be submitted in typewritten form. If oral, it shall be taken down and transcribed at the expense of the claimants offering the same.

401 7. The number of witnesses upon any one point may be limited by the officer conducting the hearing, provided that in the case of controversy an equal number shall be heard upon both sides.

8. Claimants may appear in person or by attorney; but appearance must be made on the day or days specified for the hearing for the county within which the claim is located.

9. Claimants having filed with the Secretary of this Board, ten days previous to the date of first hearing announced, claim affidavits in the form prescribed, and entitled "Claim for the Waters of the State of Nebraska," need not appear at said hearing unless they wish to offer additional testimony in support of their claims.

10. Points of law made by claimants or their attorneys, together with the authorities cited in support of the same, must be submitted in typewritten form.

11. The record in the case of each claim shall consist of:

First. The original notice filed with the County Clerk.

Second. A claim affidavit signed and verified.

Third. Additional testimony offered at hearing in support of claim.

Fourth. Points of law, and authorities cited in support of same, submitted in writing.

Fifth. Decision of Secretary, which decision will be reviewed by the Board only upon exceptions taken at time of hearing and determination.

12. The Secretary of this Board shall mail to the postoffice address of each claimant of record, at least ten days before the date of the first hearing announced, a copy of this resolution, together with a notice of the dates and places of hearings to be held within the water-shed to be adjudicated.

13. If the post-office address of a claimant of record is unknown, the said resolution and notice shall be mailed to said claimant in care of the county clerk of the county in which the claim is located.

402 14. The dates and places of hearings to be held preceding the adjudication of the rights claimed within the various water-sheds shall be determined by the Secretary; who shall also be empowered to establish such minor rules and regulations governing the conduct of said hearings as he may deem necessary."

That pursuant to the authority granted to the Secretary of the State Board of Irrigation to establish such minor rules and regulations governing the conduct of said hearings as he might deem necessary, the secretary of said Board did prepare and establish the following rules, to-wit:

Rules Governing the Practice in Matters of Contest.

"1. Any party desiring to contest a claim shall file with the State Board a written notice of contest, including a statement of the grounds thereof, together with a verified proof of service of a copy of said notice and statement upon the opposite party. Within fifteen days from the date of service of said notice and statement, the contestee shall file with the State Board his answer thereto, if any he desires to make, together with a verified proof of service of a copy thereof upon the contestant, who shall then have ten days from the date of service of said answer in which to file with said Board a reply; Provided, however, that the State Board may extend the time for answer and reply upon good cause shown.

2. Where the contestee is a non-resident or cannot be found within the state, then the said contestant shall file with the board in lieu of said verified proof of service an affidavit setting forth the facts, whereupon the Board will designate some newspaper published at the county seat of the county within which the original notice of appropriation was filed, in which newspaper shall be published for three successive weeks a notice setting forth, namely (a) that
403 such contest has been instituted, together with the name and residence of the contestant or his attorney of record; (b) the name of the claimant and the name of the stream from which the contested appropriation is claimed, together with the date upon

which the notice of such appropriation was filed with the county clerk; (c) that a notice of contest and statement of the grounds thereof is on file with the State Board; (d) the date upon or before which the answer must be filed by the contestee, which date shall not be earlier than ten days from the last date of publication of notice.

3. On or before the date set for the filing of the contestee's answer said non-resident or absent contestee shall file the same with the State Board, together with a verified proof of service or a copy thereof upon the contestant or his attorney of record.

4. The said statement of grounds of contest and answer thereto shall be verified.

5. Service upon corporations may be made upon the same officers and in the same manner as provided in the case of a summons issued by a court of law.

6. Proof of publication of the above notice shall be filed with the State Board on or before the date set for filing of the contestee's answer.

7. When the issues have thus been made up, the State Board will set a place and date for taking testimony and the hearing of the cause, and each party thereto will be notified thereof by mail or otherwise, as the board may determine.

8. At the time and place designated for hearing, each party shall produce his evidence, the contestant opening and closing. Oral arguments may also be heard in the discretion of the Board.

9. Continuances may be granted in the discretion of the board to either party at or before the time for hearing upon good cause shown.

10. The testimony offered may be oral or by deposition. If oral, it should be taken down by a stenographer and transcribed at the expense of the party offering the same, except in the case of cross-examination, the expense of which shall be borne by the opposite party; the stenographer to receive twenty cents per folio therefor, payable at the time such evidence is offered. Depositions submitted must have been taken in accordance with the rules governing in a court of law. Affidavits will only be received in ex parte matters.

11. Copies of opinions handed down by the Secretary in matters of adjudications and contests shall, upon the same day as the date of such opinions, be mailed to parties in interest.

12. If the post-office address of any person is unknown, then the decisions of the Secretary shall be mailed to said claimant in care of the county clerk of the county within which the claim is located.

* * * * *

Rules Governing in Appeals from the Decision of the Secretary in Matters of Adjudications and Contests.

Rehearing Before Secretary.

1. Any person deeming himself aggrieved by any decision of the Secretary may, at any time within ten (10) days after the receipt of

a copy of such decision, file with said secretary an application for a re-hearing. Said application shall set forth the grounds relied upon for such re-hearing in ordinary and concise language, and shall be supported by affidavit. No appeal to the Board shall be allowed until such motion has been made, and the same acted upon by the Secretary.

Appeal to State Board.

1. Any person deeming himself aggrieved on account of any decision of the Secretary on re-hearing, may appeal to the State Board of Irrigation by filing any time within fifteen (15) days after the date of such finding, a notice of appeal, accompanied by typewritten brief, together with proof of service of said notice and brief upon the parties adversely interested; all pleadings, motions, affidavits, etc., to be typewritten.

2. An appeal, claim, or contest will be reviewed by the State Board of Irrigation upon the brief or briefs submitted, and the parties thereto will be informed of the decision of said Board as provided by law.

Rehearing Before State Board.

1. Any person deeming himself aggrieved by any decision of the State Board of Irrigation on appeal from the decision of the Secretary may, at any time within forty (40) days after the receipt of a copy of said findings, file with the State Board a motion for a re-hearing. Such motion shall specify the ground upon which the application for re-hearing is based, shall be supported by affidavit, and shall be accompanied by a separate typewritten brief.

2. Decisions of the Secretary from which appeals are not taken as herein provided will be affirmed by the Board."

That prior to the 5th day of June 1896, the Secretary of the State Board of Irrigation caused to be printed in pamphlet form the rules adopted by the State Board of Irrigation on August 20, 1895, together with the rules prepared by said Secretary, as hereinbefore recited and set out, and the said rules, so established and published were accepted by the State Board and its Secretary in matters of procedure thereafter coming for hearings before the said Board.

Sixty-eighth. That on the fifth day of June, 1896, the Secretary of the State Board of Irrigation mailed a notice, together with a copy of said rules, addressed to the Farmers' Canal Company at Omaha, Nebraska, the Minatare Canal and Irrigation Company at Minatare, Nebraska, The Winters' Creek Irrigation Company at Gering, Nebraska, The Enterprise Ditch Company at Gering, Nebraska, The Castle Rock Irrigation & Water Power Company at Wilford, Nebraska, The Belmont Irrigation Canal & Water Power Company at 411 First National Bank Building, Omaha, Nebraska, The Central Irrigation Canal & Water Power Company at Gering, Nebraska, The Chimney Rock Irrigation Canal & Water Power Company at Camp Clark, Nebraska, The Alliance Irrigation Canal & Water Power Company at Camp Clark, Nebraska,

The Brown's Creek Irrigation Company at Camp Clark, Nebraska, Yorick Nichols at Collins, Nebraska, and The Nine Mile Canal & Reservoir Company at Bayard, Nebraska which said notice, mailed as aforesaid, is in words and figures following, to-wit:

Office of State Board of Irrigation.

LINCOLN, NEBR., June 5, 1896.

Notice.

Notice is hereby given that the hearing in the matter of adjudicating rights to the use of water claimed prior to April 4th 1895, within the water shed of the North Platte and Platte Rivers, will be held for the several counties therein, by an officer of the State Board of Irrigation at the places and upon the dates indicated, as follows:

For Dawson, Buffalo, Kearney, and Phelps Counties, at Lexington, on Tuesday July 7th, 1896, at the Court House:

For Lincoln County, in North Platte, on July 8th, 1896; Court House:

For Keith County, in Ogalalla, on Friday July 10th 1896; Court House:

For Duel County, in Chappell, on Saturday July 11, 1896; Court House:

For Cheyenne and Banner Counties, in Bayard, on Tuesday and Wednesday, July 14 and 15, 1896:

For Scotts Bluff and Sioux Counties, in Gering, on Friday July 17th 1896, at office of O. W. Gardner.

Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing the necessary proofs, if any be required, to sustain their claims; otherwise said claims will be dismissed.

STATE BOARD OF IRRIGATION.

W. R. AKERS,

State Engineer, Secretary.

407 Sixty-ninth. That the notice set out in the preceding paragraph was the only notice of any kind or description forwarded by the State Board of Irrigation, or its Secretary, or any officer, agent or clerk thereof, to any of the parties to this action, of the hearing to be had on July 14, 15, 16 and 17, 1896.

Seventieth. That on the 14th and 15th days of July, 1896, the Honorable W. R. Akers, Secretary of the State Board of Irrigation, went to Bayard, Nebraska, for the purpose of making inquiries and taking evidence regarding the various claims for the use of the water of the State of Nebraska; that on the 14th day of July, 1896, said W. R. Akers, Secretary of the State Board of Irrigation, heard evidence offered by each of the claimants with reference to the respective claims of the following parties, to-wit: The Chimney Rock Irrigation Canal & Water Power Company, The Nine Mile Canal & Reservoir Company, The Alliance Irrigation Canal & Water Power

Company, and Charles E. Logan; that on said day the claim of The Belmont Irrigation Canal & Water Power Company was submitted to said Secretary of said Board on the record, without the introduction or submission of any evidence that said W. R. Akers, Secretary of the State Board of Irrigation, went to Gering, Nebraska, on July 17th, 1896, to the office of O. W. Gardner, for the purpose of hearing evidence with reference to claims for the use of water; that on said day, said Secretary of said Board did make inquiries and received evidence offered by each of the claimants upon and with reference to the claims of the following named parties, to-wit: Yorick Nichols, Carrol Nichols, The Winters' Creek Irrigation Company, The Enterprise Ditch Company, The Castle Rock Irrigation Canal & Water Power Company, The Minatare Mutual Canal & Irrigating Company, The Central Irrigation Canal & Water Power Company, and The Farmers' Canal Company; that all of the evidence taken by the said Secretary of said Board on the respective claims above mentioned was reduced to writing and made a matter of record in the office of the
 408 Secretary of the State Board of Irrigation; that the evidence submitted to said Secretary by the Farmers' Canal Company and received and recorded by him was in words and figures following:

"Scotts Bluff County.

Hearing at Gering July 17, 1896.

County No. 1. Farmers' Canal Company; North Platte River; 40 ft. by 4 ft. Filed Sept. 19, 1887; Sec. 10, T. 23. 58.

County No. 14. Farmers' Canal Company; North Platte River; 200,000 miners' inches; Filed — — —, — — —. Posted Sec. 10, T. 23, R. 58.

County No. 43. Farmers' Canal Company; North Platte River; 275,000 miners' inches; Filed Mar. 14, 1895; Sec. 10, T. 23-58.

No claim affidavit on file, Water Division No. 1-A. Three claims ordered, consolidated and heard as one.

O. W. Ford appeared and being duly sworn, testified as follows:

Akers:

Q. Mr. Ford, are you acquainted with the Farmers' Canal Company?

A. Yes.

Q. How long have you been acquainted with it?

A. Since 1887.

Q. State what relation you formerly sustained with it?

A. I was secretary of it at one time.

Q. State, if you know, of a posting of a notice of appropriation, and if so, when it was posted?

A. It was posted Sept. 16, 1887.

Q. Who posted it?

A. The president and myself.

Q. After posting the notice, what was done with it?

A. I took the notice and filed it with the county clerk of Cheyenne county.

Q. Was it recorded?

A. I think so.

Q. On what date?

A. I can't tell; it was the latter part of September.

409 Q. How many days after the posting, as near as you can tell?

A. I think immediately after the posting I took it to Sidney.

Q. How long after posting and filing before there was any work done in the way of construction?

A. In November of the same year, I think.

Q. How much of a ditch was constructed there at that time?

A. At first the ditch was built twelve feet on the bottom, I think.

Q. How deep?

A. The first mile was in the neighborhood of six feet.

Q. How deep was it calculated to run water?

A. Two feet deep.

Q. How long was this ditch at that time?

A. Ten miles, the first one.

Q. How long was it from the time work was commenced on this ditch until it was used for irrigation purposes?

A. I think there was some diverted in 1888.

Q. Was there any used in 1889?

A. Yes, sir; several places watered.

Q. About how many acres were watered in 1889?

A. I cannot tell now.

Q. How much was watered in 1890?

A. Perhaps 200 acres.

Q. How much has been watered from that ditch up to the present time?

A. Possibly five hundred acres.

Q. Do you know of any other appropriations being made besides the first one?

A. Yes, sir; I do.

Q. Who made them, if you know?

A. The secretary and president made an amended or additional; I refer to the one made in 1890—the 17th day of November, 1890.

Q. Who made that?

A. John W. Weeks, president, and C. W. Ford, secretary.

Q. How was that appropriation made, the same way?

A. Yes, sir.

410 Q. When was it posted?

A. November 17, 1890.

Q. When was it filed?

A. Nov. 18, 1890.

Q. I find another notice here, made on Mar. 14, 1895?

A. Yes, sir.

Q. You may go on and testify as to the enlargement of this canal, if you know about that?

Excused.

A. B. McCosky, called and sworn, testified as follows:

Q. State what relation you have sustained to the Farmers' Canal Company, if any?

A. I worked with the engineer corps part time.

Q. Have you been present during the enlargement of that ditch?

A. I have to some extent.

Q. State what enlargement has been made?

A. The canal was enlarged to, I believe, 100 feet at the head.

Q. For how long a distance?

A. It tapers to 60 feet in 500 feet.

Q. And then runs 60 feet how far?

A. To station 50 it is sixty feet.

Q. Then what size is it?

A. If I remember right it is construction 30 ft. wide or half the size it was surveyed for probably 15 miles, possibly more. I can't give the number of stations. It is full width the first mile.

Q. Do you know anything about the amount of land that has been irrigated by this canal up to the present time, Mr. McCosky?

A. No sir.

Q. Do you know the amount it is *designated* to water?

A. No sir.

Q. Were you present and worked on the construction of the headgate of this canal?

A. Yes, sir.

411 Q. Give an outline of what this headgate is.

A. Well, as to exact dimensions, I don't know that I can remember. I had the planning or drafting of the headgate and the superintendent of the construction; if I remember right, the headgate is 136 feet wide from side of the flume to the water leaving 108 clear water space. I would not be positive, but that is my recollection.

Q. Give us an idea of the amount of labor and cost of construction of such a gate as that.

A. My understanding at the time was that it would cost something over \$10,000.00.

Excused.

W. H. WRIGHT called and sworn, testified as follows:

Akers:

Q. Are you acquainted with the Farmers' Canal Company?

A. Yes, sir.

Q. What is your relation to it, if any?

A. I am its president.

Q. How long have you been acquainted with it?

A. Since Jan. 1891.

Q. State to the stenographer something of the enlargement of this ditch and give us the length and cost of your work.

A. It has been enlarged down for the first mile to 60 feet and the next mile it is 30 feet, and that is half of the original size it is

Water Division, No. 1
District, No. 1
(The above to be filled out at the office of Board)

No. District, No.
(The above to be filled out at the office of Board)

of which a resident.)
upon my oath say:

(Numbur and Street)

(State the purpose for which water is claimed.)

(Name of ditch or canal.)

(Name of creek or river from which water is claimed.)

cubic feet per second of time.

North, South, East, or West.)

(Number.)

(c)

(Number of Miles.)

२२

Page 15

22

2

(Number of miles.)

(Number of miles.)

8th.—That the dimensions of said ditch or canal are (and will be for the uncompleted portions) as follows: HEAD-

FAST TO FORM

Location

(Number of yards)

and that the total length of fuming required is:

(Number of feet)

(Number of feet)

5/9

三

friendship and range).

+ ME⁴ Sec. 250 J2, P53

TOWNSHIP PLATS--Showing Line of Ditch or Canal

The following township plats, four in number, show where the said ditch or canal heads, and where it crosses each quarter-section of land along the line of its course.

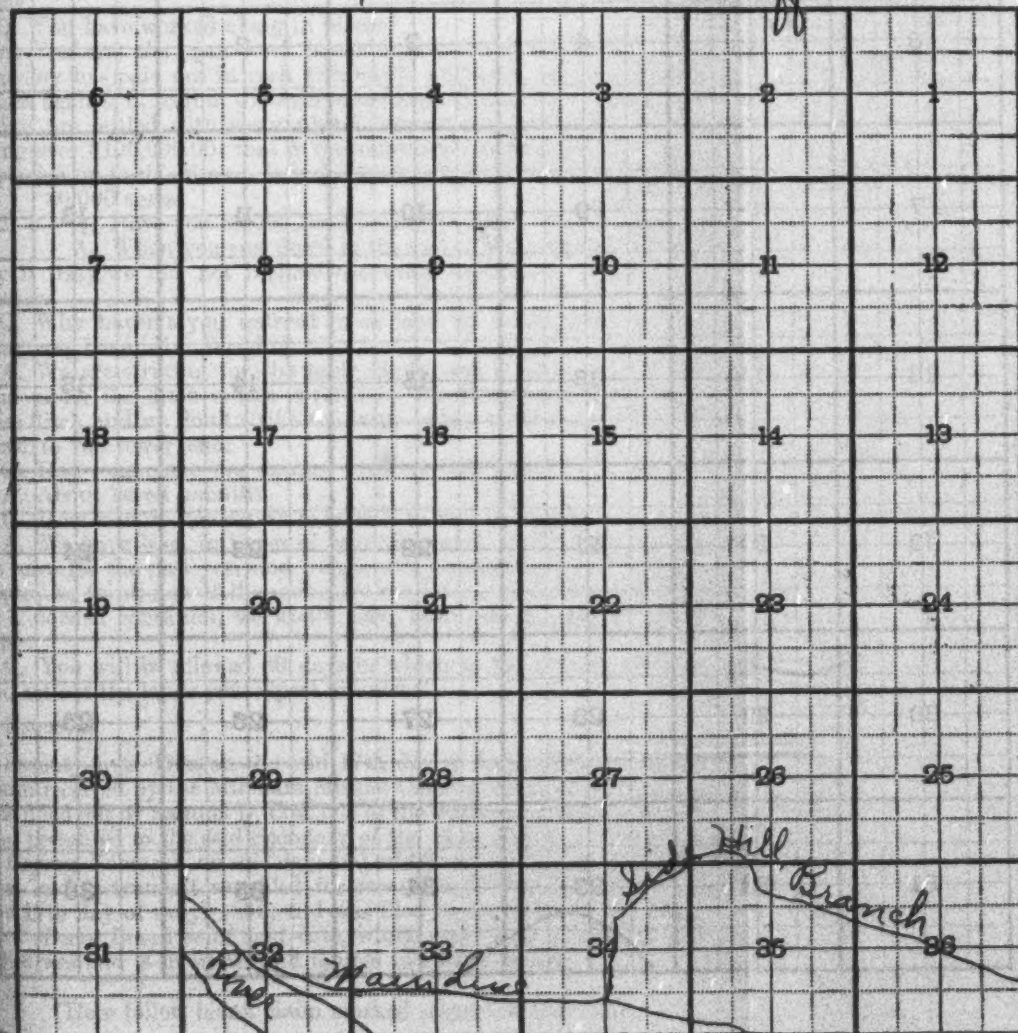
(No. filled out)

Samuel D Cox, Director

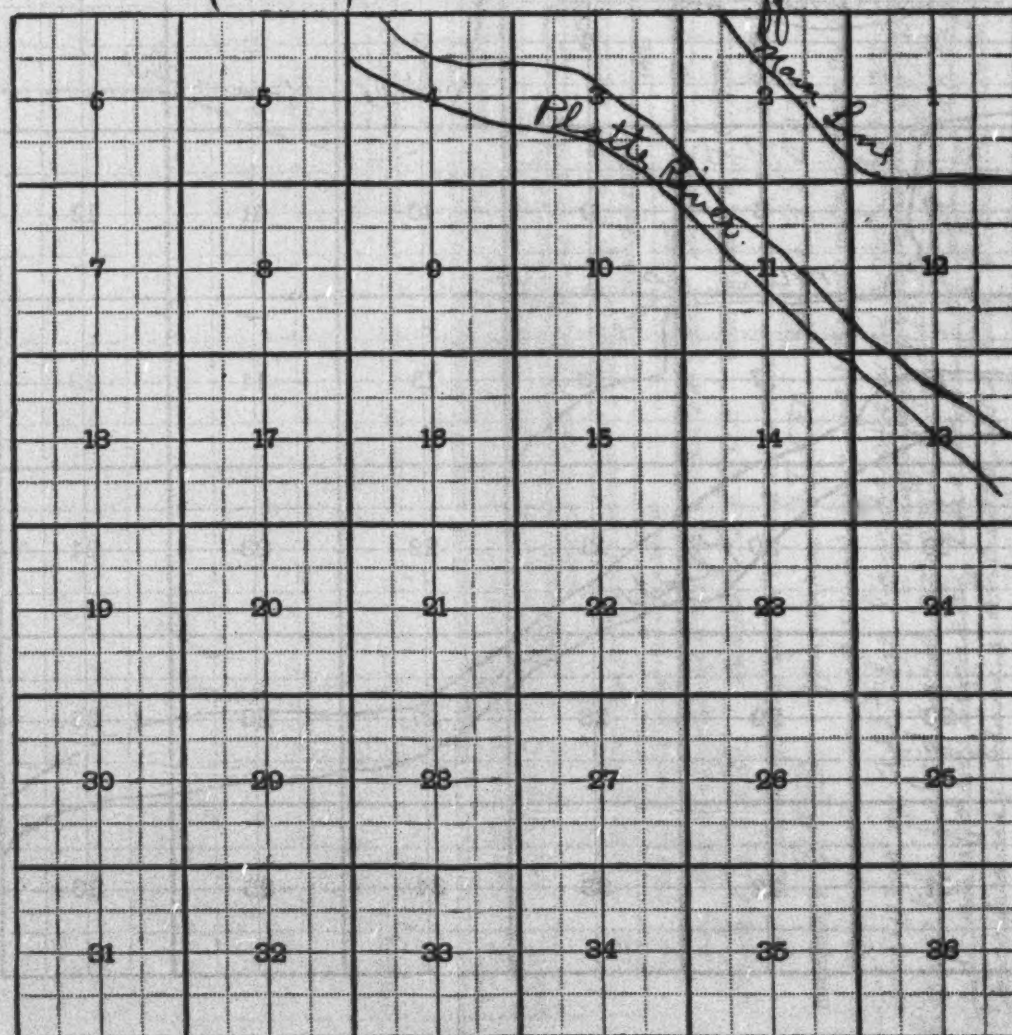
Signature of person signing application.

NOTICE.—The blanks for No. of Township, Range, etc., at top of blank plats, must be properly filled out. Plat No. 1 should be used in which to locate the head of the canal, and Plats No. 2, No. 3, etc., must be used in their order for each successive township into which the canal enters. All tracing, lettering, etc., must be done in ink, free from blurs or blots. If four blank plats are not sufficient to show the entire line of the canal, a special additional blank will be furnished free of charge, upon application to the office of the State Board.

Township 22 Range 54 W 6th P Mer. Scotts Bluff County Nebr.

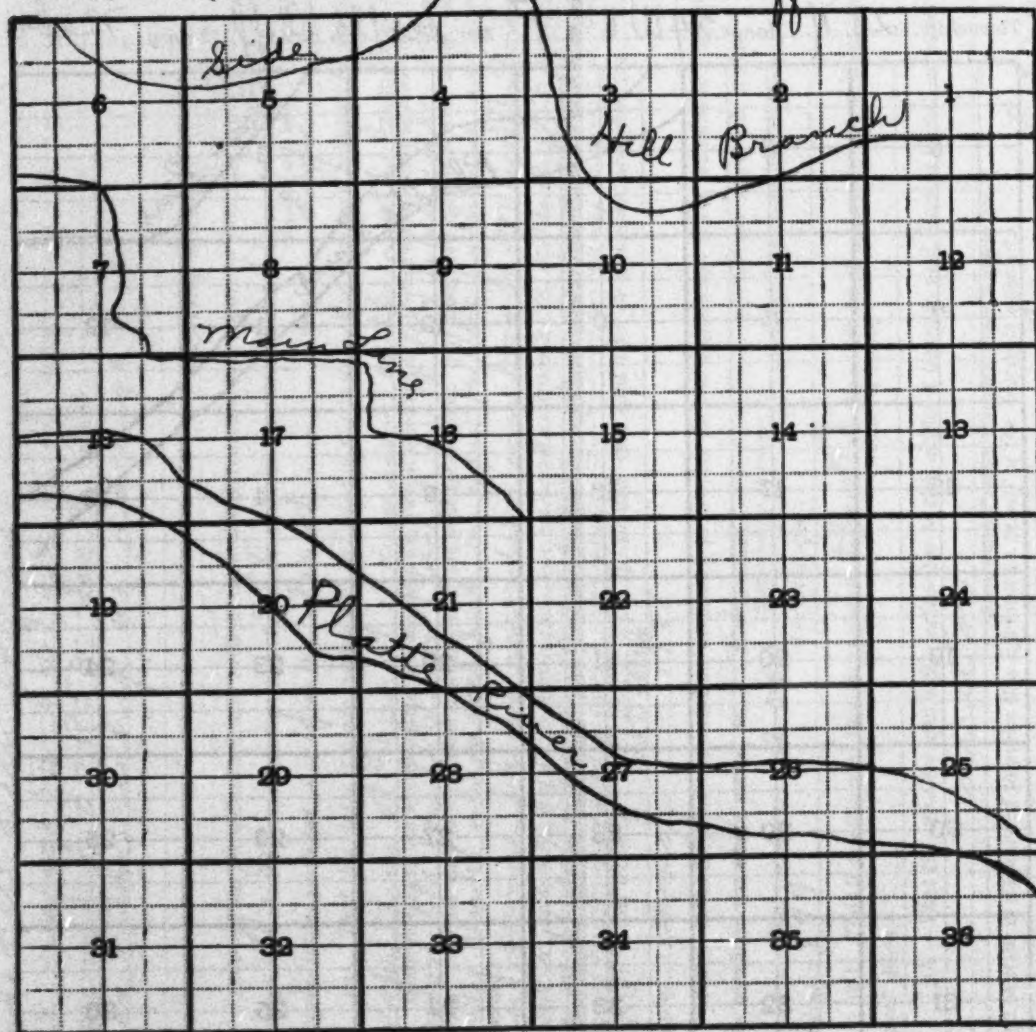


Township 21 N Range 54 W 6th P Mer. Scotts Bluff County Nebr.

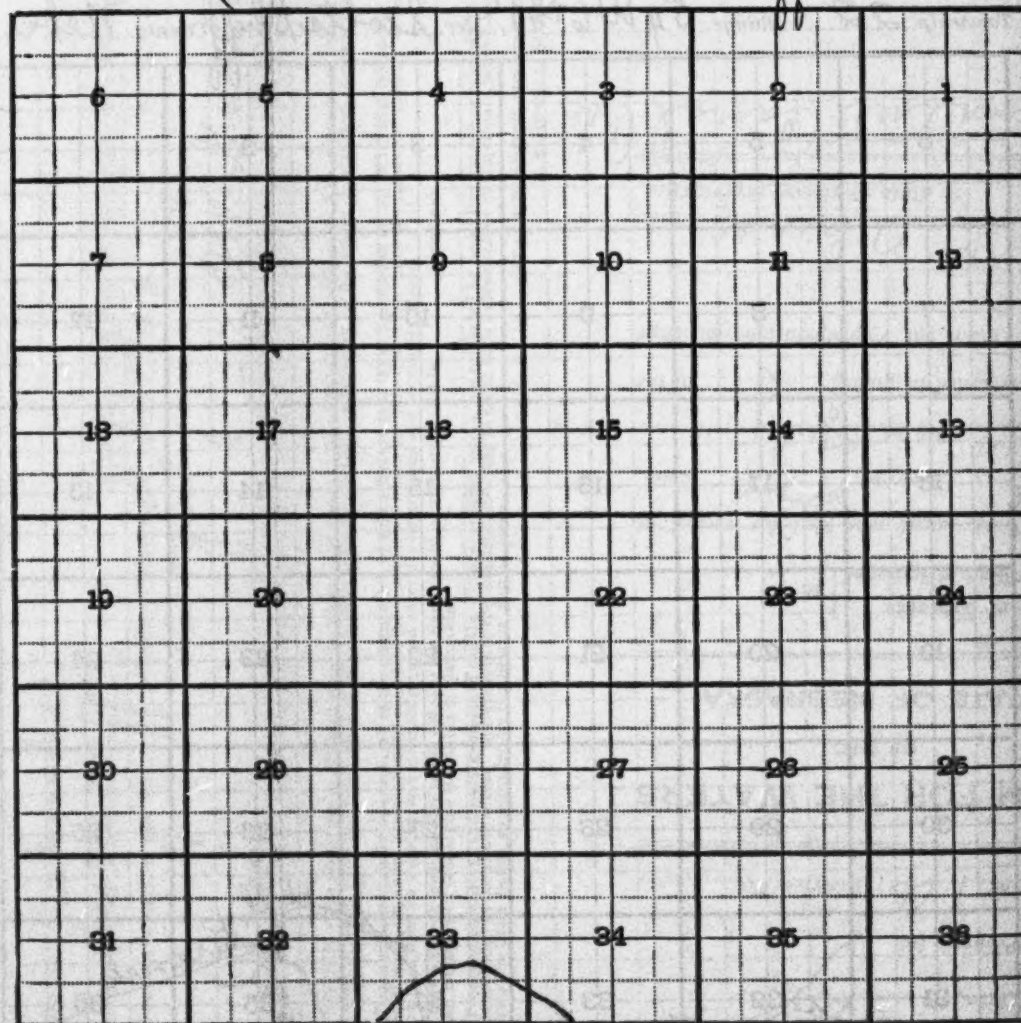


TOWNSHIP PLATS—Showing Line of Ditch or Canal

Township 21 N Range 53 W 6th Mer. Scotts Bluff County Nebr.



Township 22 N Range 53 W 6th Mer. Scotts Bluff County Nebr.



planned to be made. At that point, it is intended to put in sand gates, and from these sand gates the plan is to make it 45 feet; below these sand gates, it has been constructed 17 miles half that width.

Q. What has been the cost of construction, and you may state about the survey.

A. It has been surveyed and cross-sectioned; I think it is 71 miles. Cross sections have been finished and their permanent survey run ten miles further; below the 19 miles where it is finished, for 15 miles the work has been opened full width and perhaps nearly half done from the 19 miles that we call half-way done and 40 miles to Winters Creek.

Q. You have worked along in places?

A. Yes, sir; the open work is commenced; it is full width; the company has paid out in cash \$86,000.00 and over, and have some claims against it, so that the cash investment at this time when these claims are settled with accumulated interest will amount to something over \$100,000.00; that is the aggregate amount that has been expended up to this time. It is designed to furnish water to irrigate 80,000 acres.

412 Q. Have you 80,000 acres under the ditch, Mr. Wright?

A. When you run down to the end of the preliminary survey it has; we did not include the water carried by the smaller ditches.

Q. Why haven't you watered more land up to the present time than you have, Mr. Wright?

A. We are striking for the table lands, and a large part of the land under the ditch is also covered by the Ramshorn and Enterprise ditch and we don't strike the large bodies of land until we get down to the lower end.

Q. How long since you stopped work on this ditch?

A. About seven months.

Q. How soon do you expect to be able to resume work?

A. We have been in hopes of resuming work in the near future; we have for the past year and we are still negotiating and still have hopes; we think now if the monetary conditions of the country were in a normal condition, we would have been able to resume before this.

Q. You will be allowed 30 days in which to file a claim affidavit and set out the lands you expect to water."

Excused.

Seventy-first. That on the said 17th day of July, 1896, the blank claim received by the Minatare Mutual Canal & Irrigating Company was filled out by Samuel D. Cox, one of the directors of said company, and presented to the said Secretary of the State Board of Irrigation, at Gering, Nebraska, on said day, and said Secretary endorsed thereon that said instrument was filed for record at 3:30 o'clock P. M. on the 17th day of July, 1896, and was filed in the office of the Secretary of said Board as of said date, which said claim as filed in said office was and is in words and figures following, to-wit:

(Here follow blank claim marked pages 413 and 414.)

415 Seventy-second. That no order was applied for, made or entered, continuing the hearings had on the 14th, 15th, 16th and 17th day- of July 1896, or any of said hearings, to any other or subsequent time or date; nor was any announcement made, or notice given, that said claims, or any of them, would again be considered or heard by said Board, or its Secretary, or any officer thereof; that no other hearing with reference to the above mentioned claims, or either of them, was ever applied for, ordered or held by the State Board of Irrigation, or its Secretary, or any officer thereof, or otherwise, except the Steamboat, Castle Rock, Belmont and Alliance Ditches had re-hearings on their respective applications, without notice to others, which re-hearings were held subsequent to April 7, 1897.

Seventy-third. That the blank received by the Farmers' Canal Company was filled out by an officer of the company and returned to the office of the secretary of the State Board of Irrigation, and filed in his office on the 19th day of September 1896; that no notice of the filing of said claim was given by the Farmers' Canal Company, or by the State Board of Irrigation, or its Secretary, or any officer thereof, to any of the parties to this action, or to any other claimant of water from the North Platte river, and no other claimant of water from the North Platte river, had at said time or for many years thereafter, any actual knowledge of the filing thereof by said Farmers' Canal Company; that said claim, so filled out and filed in the office of the Secretary of the State Board of Irrigation by said Farmers' Canal Company, was and is in words and figures following, to-wit:

(Here follows blank claim marked pages 416 and 417.)

Water Division, No. _____ District, No. _____
(The above to be filled out at the office of Board)

amounting in all to 70000 acres.
(Total number of acres)

12th.—That the actual work of excavation and construction was begun on the _____ day of _____, 1 _____, and the work _____ day of _____, 1 _____ completed, and the appropriation perfected on or before the _____ day of _____, 1 _____.

(a) That this claim is made, under and by virtue of rights deemed to have been acquired by _____

(State whether by application of water to a beneficial use without objection, or by posting notice and filing same with County Clerk, as prescribed by law. If by use, state nature, date of commencement, and period of duration: if by filing, state date of posting notice, date of record, and where recorded.)

(b) That water _____ turned into said ditch or canal on or before the _____ day of _____, 1 _____ (Was, or will be.)

13th.—That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated, is five years from April 4th, 1895.
(State number of years.)

(c) That there were _____ acres of crops actually irrigated from said ditch or canal during 1 _____
(Number of acres.)

(d) That it is estimated that there will be _____ acres of crops irrigated from said ditch or canal during 1 _____
(Number of acres.)

14th.—That the relation which the subscriber to this affidavit bears to said ditch or canal, or other work, is that of _____ president _____
(State whether owner, manager, superintendent, etc.)

and that he is authorized to make this affidavit in behalf of the interests affected.
William H. Wright
(signature.)

State of Nebraska
County of Scotts Bluff
and sworn to before me by William H. Wright
this 15th day of September, 1896

(SEAL) My Commission expires Oct. 7, 1901,
M. J. Hoffman,
Notary Public.

NOTICE.—The above claim affidavit must be signed and sworn to by some person closely related in interest, (or having authority, delegated or personally controlling same.)

Too much care cannot be exercised in the preparation of this affidavit, as it is the foundation for all additional testimony that will be taken (upon the ground) by under Secretary, to complete the record from which the Board will determine the rights and priority of the claimant. Therefore, generations must be avoided, and all facts required carefully determined and accurately stated.

This affidavit must be filed at the office of the State Board of Irrigation within _____ days from _____

Proposed extensions and enlargements of canals, ditches, or other works, not protected by new filings made previously to April 4th, 1895, must not be included in this claim. Individuals or corporations, desiring to make such extensions or enlargements, must make application for a permit from the State Board, as provided by the Statute now in force.

STATE BOARD OF IRRIGATION.
R. B. HOWELL, State Engineer, Secretary.

Claim, No. 393
Priority, No. _____
Index, No. 1-A, District, No. _____
CLAIM FOR THE WATERS
OF THE
STATE OF NEBRASKA

File at Nebraska
State Board of Irrigation
This instrument was filed for record at
9 o'clock, fore noon, Sept 1896
in 19 day of _____ of the
_____ of the _____
_____ of Claim for Appropriation on Page _____
W. F. Aiken
State Engineer, Secretary.

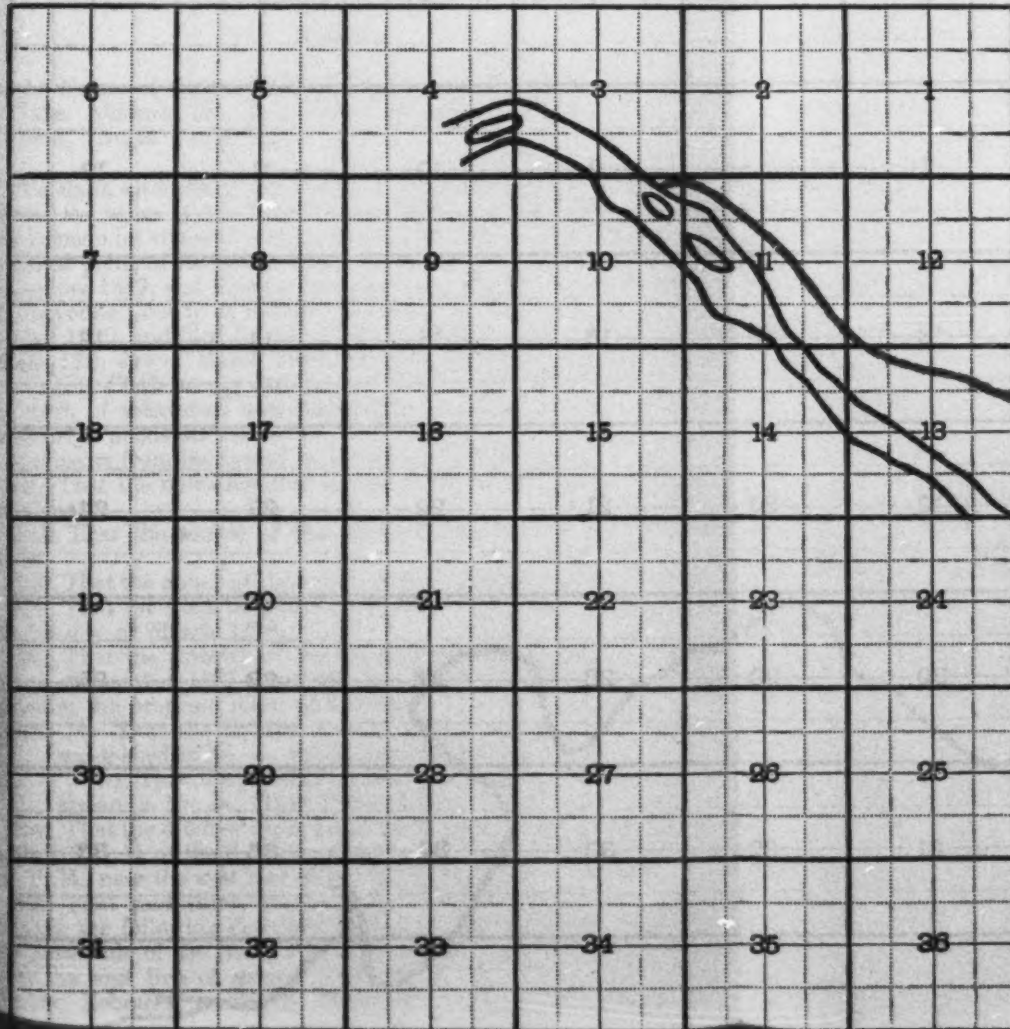
TOWNSHIP PLATS—Showing Line of Ditch or Canal

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(No. filled out)

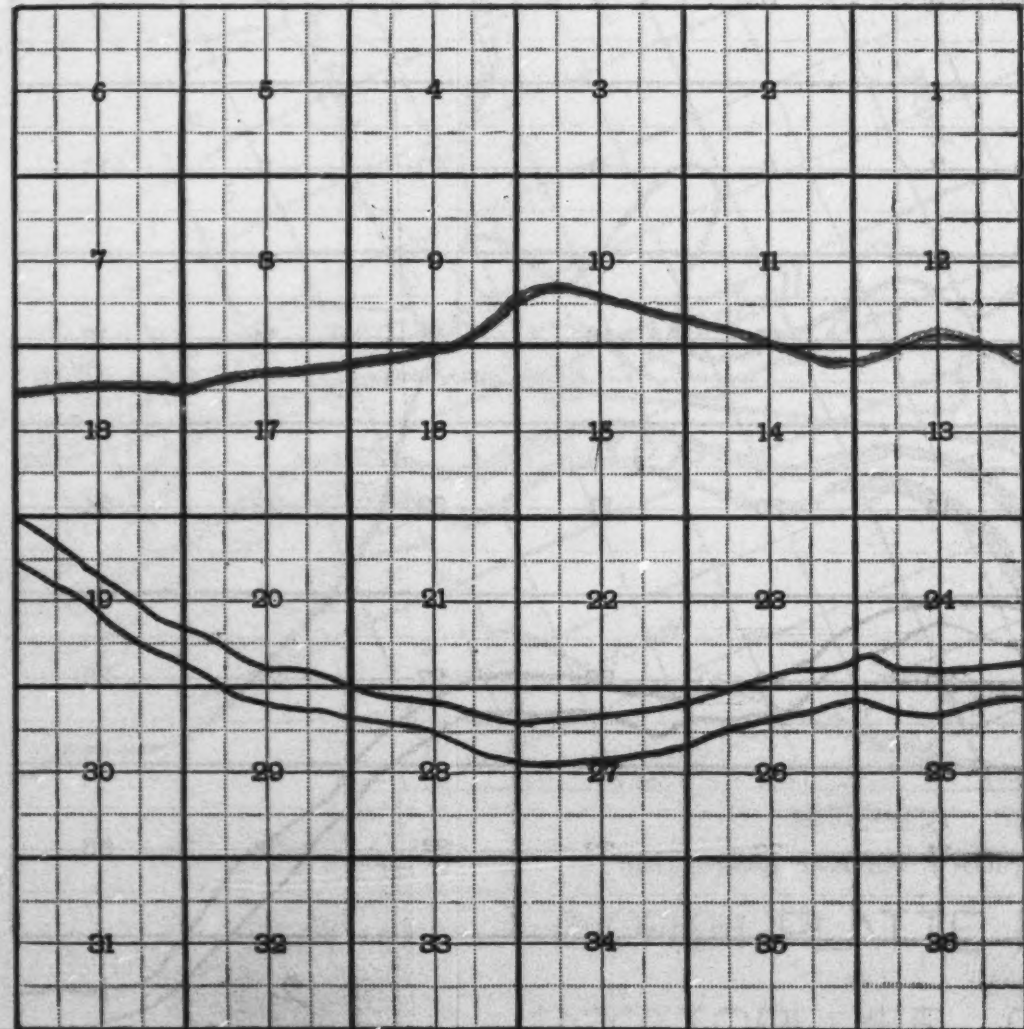
Signature of person signing application.

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Township 23 Range 58 ¹ Mer. County

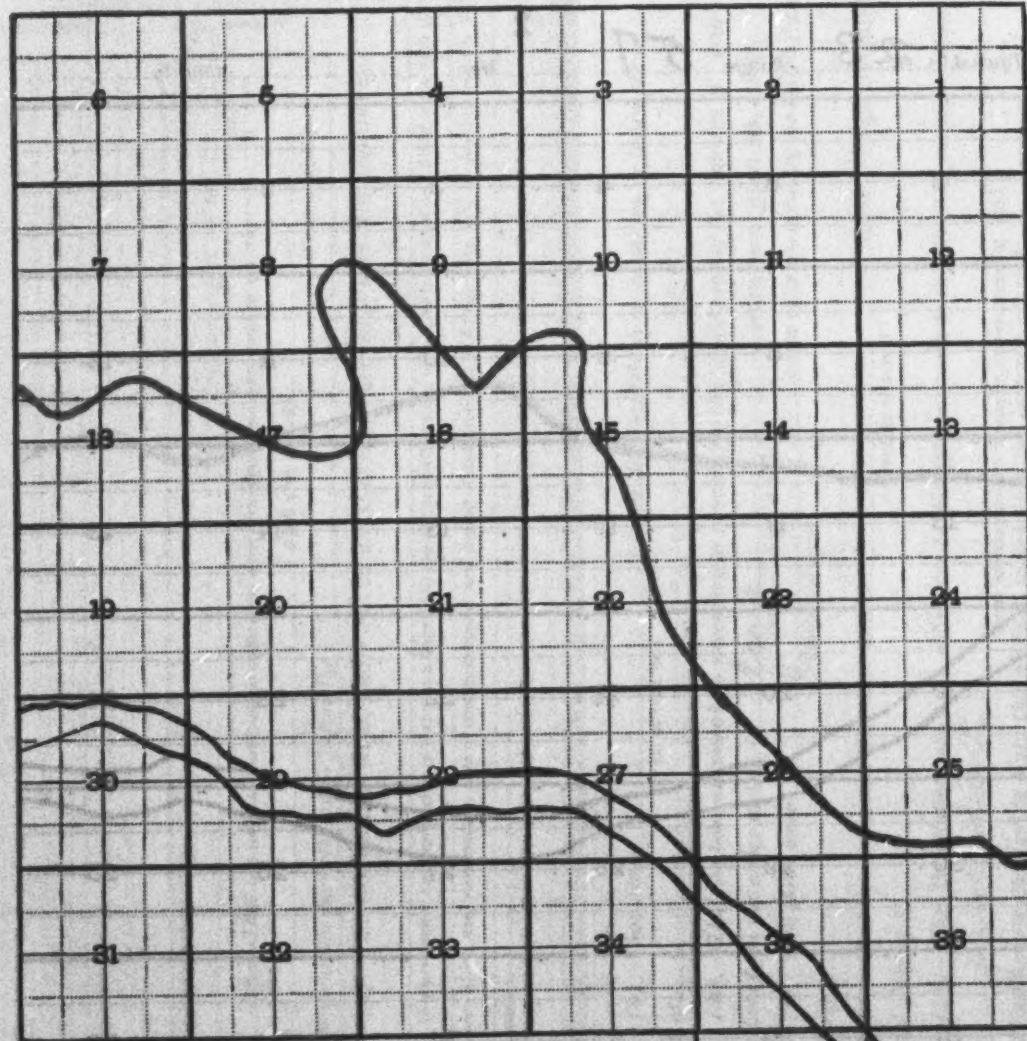


Township 23 Range 57 ² Mer. County



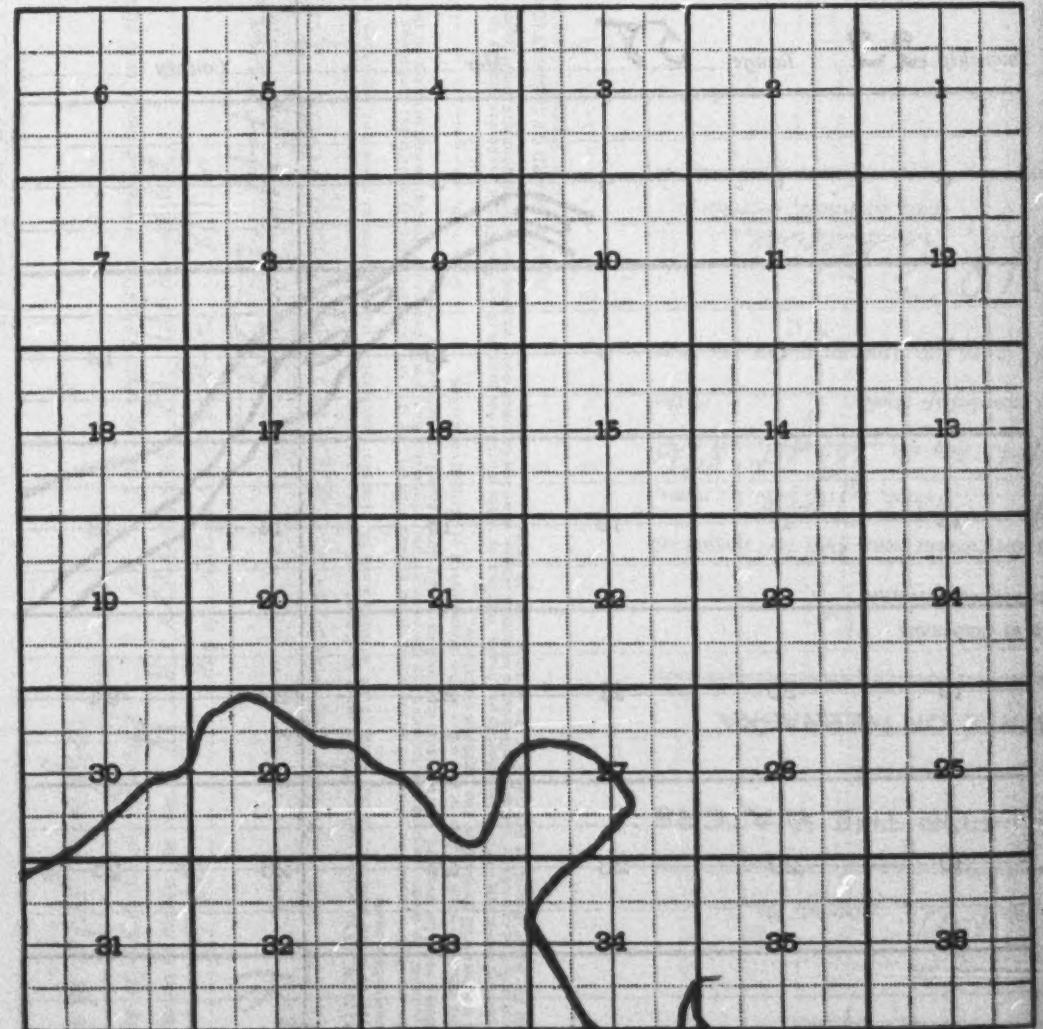
TOWNSHIP PLATS—Showing Line of Ditch or Canal

Township 23 Range 56 Mer. 3 County



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Township Range Mer. 4 County



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418 Seventy-fourth. That on the 7th day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of the Farmers' Canal Company, and made the same a matter of record in his office, and forwarded a copy thereof to said The Farmers' Canal Company, but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said river; which said opinion is in words and figures following, to-wit:

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Docket No. 918.

Opinion.

In the Matter of Claim, County Nos. 1, 14 & 43; Scotts Bluff Co.; Claim Affidavit No. 323; Water Division No. 1-A; "Farmers Canal," North Platte River.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation purposes, and is made by virtue of posting three notices of appropriation at the proposed point of diversion, No. 1 being posted on the 16th day of September 1887, and filed for record in the office of the county clerk of Cheyenne County at Sidney, Nebraska, on the 17th day of November 1890, and filed for record the same day. No. 43 was posted on the 12th day of March 1895 and filed for record in the office of the County Clerk on the 14th day of March 1895, and commencing the work of excavation and construction upon a proposed ditch or canal on or about the 1st day of March 1888.

It appears from the record in the matter of this claim:

1st. That the name adopted for the ditch or canal is the "Farmers Canal."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is the irrigation of lands.

4th. That the work of actual construction was begun on or about the 1st day of March 1888.

5th. That the priority of the appropriation dates from the 16th day of September 1887 when the first notice of appropriation was posted at the proposed point of diversion.

6th. (a) That the priority number of the appropriation for the water-shed is No. —, water Division No. 1-A:

420 (b) That the priority number of the appropriation for the stream is No. —, North Platte River.

7th. That the ditch or canal heads on the north bank of the stream in the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 3, T. 23, N. R. 58, west of the 6th P. M., near the west line of sec. 10, T. 20, R. 58.

8th. That said ditch is about 81 miles in length and passes through the following described lands, viz: Beginning at a point on the north side of the North Platte River, near where the river intersects the west line of section 10, in T. 23, R. 58, in Scotts Bluff County, Nebraska, on the N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ of said section 10,

thence through and over the E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of said section 10, the S. $\frac{1}{2}$ sec. 11; N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 14; N. $\frac{1}{2}$ sec. 13, all in T. 23, R. 58. Thence through and over the N. $\frac{1}{2}$ sec. 18, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 17, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ sec. 16, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 9 S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 10, S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 11, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 14, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 13, S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 12, all in T. 23, R. 57; thence through and over N. $\frac{1}{2}$ N. W. 14, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 18, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 7, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 17, E. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 8, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 9, E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 16, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 10, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 15, all in T. 23, R. 56; thence through and over the N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of sec. 23, the N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 27, W. $\frac{1}{2}$ and S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, sec. 26, S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ sec. 25, N. $\frac{1}{2}$ sec. 36, all in Township 23, R. 56; thence through and over S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. sec. 31, S. W. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, sec. 32, W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 29, N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 30, W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, 421 S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 28, N. $\frac{1}{2}$, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 33, S. W. $\frac{1}{4}$ sec. 27, N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 34, E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 33, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 34, all in T. 23, R. 55; thence through and over Lot 1, sec. 4, Lots 1, 3 and 4, Sec. 3, Lot 4, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 2, S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 1, N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 12, all in T. 22, R. 55; thence through and over N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ sec. 7, S. $\frac{1}{2}$ sec. 6, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, sec. 8, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 9, S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, sec. 4, S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 8, E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 17, S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 16, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 15, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 14, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 13, all in T. 22, R. 54; thence through and over S. $\frac{1}{2}$ sec. 18, S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 17, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 20, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 21, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ sec. 22, S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 15, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, E. $\frac{1}{2}$ N. W. $\frac{1}{4}$ W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 14, S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 11, E. $\frac{1}{2}$ N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 23, E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 26, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 25, N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 36 all in t. 22, R. 53; thence over and through the following described lands; N. $\frac{1}{4}$ sec. 31, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 29 all in T. 22, R. 52 and all the above

in Scotts Bluff County, Nebraska. Thence over and through the following lands in Cheyenne County, Nebraska, viz: W. $\frac{1}{2}$ S. W. $\frac{1}{4}$ sec. 28, W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, E. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 33, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and lot 2 in sec. 4, all in T. 21, R. 52. Thence over and through S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$ sec. 34 in Township 22, Range 52; thence over and through S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, lots 1, 3 and 4, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 3, T. 21, R. 52; thence
 422 over and through S. E. $\frac{1}{4}$ S. E. — S. E. $\frac{1}{4}$ sec. 34, S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 35, T. 22, R. 52 also over S. $\frac{1}{2}$ sec. 36, same Twp. and Range. Thence over and through sections 6, 8, 16, 21, 22, 27, 26 and 25 in Township 21, Range 51.

9th. That said ditch or canal covers and reclaims the following described lands, viz: a part of lot 1, T. 22, R. 58; parts of lots 1 and 2, in sec. 11; lots 1 and 2 and a part of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, sec. 14, part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, a part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and Lots 1, 2 and 3 in sec. 13 all in T. 23, R. 58. The south part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ lots 4 and 5 sec. 18; a part of N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 19 all in T. 23, R. 57. A part of the N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 17; a part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, a part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ in sec. 20; a part of N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, sec. 16; N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ and a part of S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ in sec. 20; a part of N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ sec. 10; all of sec. 15, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of sec. 22; a part of S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 11; a part of N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, the S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$, a part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, a part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, a part of N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 14; a part of S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, a part of S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of sec. 12; a part of S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ in sec. 13; a part of N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ sec. 13; a part of N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ sec. 24, all in T. 23, R. 57, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ sec. 18; a part of N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, a part of N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ sec. 19; a part of N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and a part of S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ sec. 17; also a part of E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 17; a part of S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, a part of E. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 8; a part of S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, a part of E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 9; a part of W. $\frac{1}{2}$ S. W. $\frac{1}{4}$ sec. 10; a part of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ sec. 16; N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of sec. 20; S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of sec. 21; a part of W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, a part of S. W. $\frac{1}{4}$ of sec. 15; N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part of S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, a part of N.

E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part of W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part of E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and a part of W. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 22; a part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ sec. 27, a part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of sec. 27, a part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, a part of N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ sec. 26, a part of N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 35; a part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of sec. 36, all in T. 23, R. 56. A part of S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of N. W. — S. W. $\frac{1}{4}$, part of S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 31; a part of S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of E. $\frac{1}{2}$ N. W. $\frac{1}{4}$ and part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$, part E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and a part W. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 32; a part N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 29; a part W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 28; N. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part E. $\frac{1}{2}$ S. E. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and S. W. $\frac{1}{4}$ sec. 33; a part N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, a part of S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 27; N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, a part of S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ parts $\frac{1}{2}$ N. W. $\frac{1}{4}$ part W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and a part S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 34, all in T. 23, R. 55, E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part of W. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 4; S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ sec. 3; N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 10; S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 2; N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of sec. 11; S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of sec. 1; W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 12; N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 13, all in T. 22, R. 55. The S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of sec. 7; N. W. $\frac{1}{4}$, part W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$ in sec. 18; part N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$, sec. 6; part N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part N. E. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, E. $\frac{1}{2}$ S. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ 424 S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, and part of N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 8; part of N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ of sec. 17; S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ and part of N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 9; part of S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part of W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of sec. 4; N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part of N. $\frac{1}{2}$ N. W. $\frac{1}{4}$ of sec. 3; N. $\frac{1}{2}$, part of N. $\frac{1}{2}$ S.

W. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ and part of S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 20; S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 16; N. $\frac{1}{2}$, S. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, and part S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 21; part of N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of sec. 28; S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part N. $\frac{1}{2}$, S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 15; all of sec. 22; N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part of S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 27; S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 14; all of sec. 23; N. $\frac{1}{2}$, S. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of sec. 26; part of N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of sec. 35; S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 13; all of sections 24 and 25; N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part of S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of sec. 36 all in T. 22, R. 54. S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ in sec. 18; all of sections 19, 30 and 34; S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ and S. $\frac{1}{2}$ of sec. 20; all of sections 29 and 32; S. $\frac{1}{2}$ S. W. $\frac{1}{4}$, part of N. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, part of N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of sec. 21; all of sections 28 and 33; S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ and S. $\frac{1}{2}$ of sec. 12; part E. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. $\frac{1}{2}$ S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and part of N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 15; all of sections 27 and 34; S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$, and S. W. $\frac{1}{4}$ sec. 14; W. $\frac{1}{2}$ W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part E. $\frac{1}{2}$ N. E. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 23; W. $\frac{1}{2}$, S. E. $\frac{1}{4}$, W. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part S. E. $\frac{1}{4}$, N. E. $\frac{1}{4}$ of sec. 26; all of sec. 35; part S. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part S. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. E. $\frac{1}{4}$, W. $\frac{1}{2}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, part S. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$, W. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 25; S. $\frac{1}{2}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 36, all in Township 22, Range 53. All of section 6; N. E. $\frac{1}{4}$, N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, and part of S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ of sec. 7; all of sec. 8, 5, 4, and 9; N. $\frac{1}{2}$, part N. $\frac{1}{2}$ S. E. $\frac{1}{4}$, part S. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 16; all of sections 3, 10, and 15; N. E. $\frac{1}{4}$, part $\frac{1}{2}$ S. W. $\frac{1}{4}$, part S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of sec. 22; all of sections 2, 11, and 14; N. $\frac{1}{2}$ of sec. 23; all of sections 1, 12, 13, N. $\frac{1}{2}$ of sec. 24, all in T. 21, R. 53. S. $\frac{1}{2}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, part N. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, part N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ and part N. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ of sec. 31; S. $\frac{1}{2}$, N. E. $\frac{1}{4}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$ and part N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$ of sec. 32; S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part S. $\frac{1}{2}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$, E. $\frac{1}{2}$ S. W. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ and part S. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of sec. 29, all in T. 22, R. 52. All of sections 6, 5, 7, 8, 17, 18, 19 and 20 in T. 21, R. 52. The following described lands in Cheyenne County, to-wit: S. $\frac{1}{2}$, N. W. $\frac{1}{4}$, part N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ of sec. 4; all of sections 9, 16 and 21; N. $\frac{1}{2}$ of sec. 28; part N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$, N. E. $\frac{1}{4}$

N. W. $\frac{1}{4}$, S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, part N. E. $\frac{1}{4}$, S. $\frac{1}{2}$ of sec. 3, all of sections 10, 15, and 22; N. $\frac{1}{2}$ and part E. $\frac{1}{2}$ S. E. $\frac{1}{4}$ of sec. 27; all of sections 1, 2, 11, 14, 23, 26, 12, 13, 25 and 24; N. $\frac{1}{2}$, part of S. W. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ of sec. 36, all in town 21, Range 52; part of N. W. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ of sec. 33; part of S. $\frac{1}{2}$ S. W. $\frac{1}{4}$ of sec. 34; part of S. W. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of sec. 35; part of S. $\frac{1}{2}$ of sec. 36, all in T. 22; R. 52. Part of N. W. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ and part of S. W. $\frac{1}{4}$ of sec. 36; all of sections 7, 18, 19, 30 and 31; part of N. W. $\frac{1}{4}$, part of S. W. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ of sec. 8; all of sections 17, 20, 29, and 32; part of N. W. $\frac{1}{4}$, part of N. E. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ and the S. W. $\frac{1}{4}$ of sec. 16; part of N. E. $\frac{1}{4}$, part of S. E. $\frac{1}{4}$ and W. $\frac{1}{2}$ of section 21; all of sections 28 and 33; part of N. $\frac{1}{2}$ and the S. $\frac{1}{2}$ of sec. 27; all of section 34; part of S. $\frac{1}{2}$ of sec. 26; all of section 35; part of S. $\frac{1}{2}$ of sec. 25; all of sec. 36 all in T. 21, R. 51, part of N. W. $\frac{1}{4}$ of sec. 2; the N. $\frac{1}{2}$ and part of S. $\frac{1}{2}$ of sec.; all in T. 20, R. 52. The N. $\frac{1}{2}$ and part of S. $\frac{1}{2}$ of section 6; all of sections 2, 3, 4 and 5; part of N. $\frac{1}{2}$ of sec. 8; part of N. $\frac{1}{2}$ of sec. 9; part of N. $\frac{1}{2}$ sec. 10 all in T. 20, R. 51, amounting in all to about 80,000 acres.

426 The Claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1st 1904.

3rd. The amount of the appropriation shall not exceed Eleven hundred and forty-two and six-sevenths ($1142 \frac{6}{7}$) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry and, further, said appropriation under any circumstances, shall be limited to one-seventieth ($\frac{1}{70}$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st, 1904.

W. R. AKERS,

State Engineer, Secretary.

Dated January 9, 1897.

427 Seventy-fifth. That on the 7th day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Enterprise Ditch Company, and made the same a matter of record in his office, and forwarded a copy thereof to said The Enterprise Ditch Company, but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said river, which said opinion is in words and figures following, to-wit:

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Docket No. 920.

Opinion.

In the Matter of Claim, County Nos. 4 & 36; Scotts Bluff Co.; Claim Affidavit No. 270; Water Division No. 1-A; "Enterprise Ditch," North Platte River.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation and other useful purposes, and is made by virtue of posting two notices of appropriation at the proposed point of diversion, the first being posted on the 28th day of March 1889, and filed for record in the office of the county clerk of Scotts Bluff County on the 30th day of March 1889; the second notice of appropriation being posted at the same point on the 18th day of August 1893, filed for record on the same day in the office of the county clerk of Scotts Bluff County, and commencing the work of excavation and construction on the 5th day of March 1889.

It appears and is hereby found and determined from the record in the matter of this claim:

1st. That the name adopted for the ditch or canal is the "Enterprise Ditch."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is the irrigation of lands.

4th. That the work of excavation and construction was begun on the 5th day of March 1889.

5th. That the priority of the appropriation dates from the 28th day of March 1889, when a notice of appropriation was posted at the proposed point of diversion.

6th. (a) That the priority number of the appropriation for the water-shed is No. —, Water Division No. 1-A.

429 (b) That the priority number of the appropriation for the stream is No. —, North Platte River.

7th. That the ditch or canal heads on the north bank of the stream in the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 27, T. 23, N. R. 57, West of the 6th P. M.

8th. That said ditch or canal when completed will be about 28 miles in length and will pass through the following described lands, viz: secs. 27, 22, 23, 14, 13, 24 T. 23, N. R. 57, West of the 6th P. M.; secs. 19, 20, 21, 22, 27, 26, 35, 36, T. 23, N. E. 86, West of the 6th P. M.; secs. 31, 32, 35, T. 23, N. R. 56, West of the 6th P. M.; secs. 6, 5, 4, 9, 10, 11, 14, 13, T. 22, N. R. 35, West of the 6th P. M.; secs. 18, 8, 17, T. 23, N. R. 54, West of the 6th P. M.

9th. That said ditch or canal covers and reclaims the following described lands, viz.; parts or all of secs. 23, 24, T. 23, N. R. 57, West of the 6th P. M.; sec. 19, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 20, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 29, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 21, sec. 26, S. W. $\frac{1}{4}$

sec. 22, sec. 27, S. W. $\frac{1}{4}$ sec. 26, N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$, S. E. $\frac{1}{4}$ sec. 35, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$, S. E. $\frac{1}{4}$ sec. 36, all in T. 23, N. R. 56, West of the 6th P. M.; N. E. $\frac{1}{4}$ sec. 31, T. 22, R. 56; S. W. $\frac{1}{4}$ sec. 31, S. E. $\frac{1}{4}$ sec. 32, T. 23, R. 56; N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 6; S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 5; N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 8; N. E. $\frac{1}{4}$ of sec. 17; S. W. $\frac{1}{4}$ sec. 4, N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 9; secs. 16, 15, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 10; N. E. $\frac{1}{4}$ sec. 22, N. W. $\frac{1}{4}$ sec. 23, sec. 14, S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 10, T. 22, N. R. 55, West of the 6th P. M. S. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ and N. E. $\frac{1}{4}$ sec. 18; N. W. $\frac{1}{4}$ N. E. $\frac{1}{4}$ sec. 19; N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ sec. 17; N. W. $\frac{1}{4}$ sec. 20, all in T. 22, R. 54, West of the 6th P. M., amounting in all to about 12,160 acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1st 1900.

430 3rd. The amount of the appropriation shall not exceed 173 $\frac{5}{7}$ cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one seventieth ($\frac{1}{70}$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied or or before September 1st 1900.

W. R. AKERS,
State Engineer, Secretary.

Dated January 7, 1897.

431

Docket No. 920.

Opinion on Review.

In the Matter of Claim, County Nos. 4 & 36; Scotts Bluff County; Claim Affidavit No. 270; Water Division No. 1-A; Enterprise Ditch Company, Claimant, North Platte River.

Be it remembered that on the 20th day of April 1897, Lewis F. Saunders by his Attorney, Nellie M. Richardson, filed a motion in the Office of the State Board of Irrigation, praying that the opinion in the above entitled cause handed down on the 7th day of January 1897, be so changed and modified as to exclude from the lands to be watered by the said Enterprise Ditch, the lands described in the application of said Lewis F. Saunders, viz: N. W. $\frac{1}{4}$ of sec. 9, S. E. $\frac{1}{4}$ of sec. 8, N. E. $\frac{1}{4}$ of sec. 17, and N. W. $\frac{1}{4}$ of sec. 16, all in T. 22, N. R. 55, West; and that the said Lewis F. Saunders be permitted to reclaim the same from the waters of Spring Creek. The said motion was supported by the affidavits of F. W. Enderly, I. Simonian, J. F. Draper, W. M. Barbour, A. J. Castle, M. F. Johnson,

T. D. Deutsch, A. B. McCoskey and Frank Beers, et al., all of whom are members of the Enterprise Ditch Company and land owners under the same. The case is therefore taken up for review, and after a careful examination of the testimony set out in the affidavits, it is hereby considered, that the former finding of the Secretary of this Board ought to be, and the same is hereby modified so as to exclude from the lands to be irrigated by the Enterprise Ditch, The N. W. $\frac{1}{4}$ of sec. 9, S. E. $\frac{1}{4}$ sec. 8, N. E. $\frac{1}{4}$ sec. 17, and N. W. $\frac{1}{4}$ sec. 16, all in T. 22, N. R. 55, West, and the said land is hereby granted to the said Lewis F. Sanders for the purpose of reclamation from Spring Creek.

W. R. AKERS, *Secretary.*

Dated April 20, 1897.

432 Seventy-sixth. That on the seventh day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Minatare Mutual Canal & Irrigating Company, and made the same a matter of record in his office and forwarded a copy thereof to said The Minatare Mutual Canal & Irrigating Company, but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said river, which said opinion is in words and figures following, to-wit:

433

Docket No. 919.

Opinion.

In the Matter of Claim, County Nos. 2 & 3; Scotts Bluff Co.; Claim Affidavit No. 320; Water Division No. 1-A; "Minatare Ditch," North Platte River.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation purposes, and is made by virtue of posting two notices of appropriation on the 14th day of January 1888, filing the same for record in the office of the county clerk of Scotts Bluff County on the same day, and commencing the work of excavation and construction upon the proposed ditch or canal in compliance with the provisions of the general irrigation law of 1889 then in force.

It appears from the record in the matter of this claim:—

1st. That the name adopted for the ditch or canal is the "Minatare Ditch."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is the irrigation of lands.

4th. That the work of excavation and construction was begun on the 8th day of February 1888.

5th. That the priority of the appropriation dates from the 14th day of January 1888, when the notice of appropriation was posted at the proposed point of diversion.

6th. (a) That the priority number of the appropriation for the water-shed is No. —, Water Division No. 1-A:

434 (b) That the priority number of the appropriation for the stream is No. —, North Platte River.

7th. That the ditch or canal heads on the north bank of the stream in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 32, T. 22, R. 54, West of the 6th P. M.

8th. That the ditch or canal when completed will be about 24 miles in length, and is built in two branches, and will pass through the following described lands, viz: main ditch, secs. 32, 33, 34, 35, T. 22, N. R. 54, West of the 6th P. M.; secs. 2, 1, 12, T. 21, N. R. 54, West of the 6th P. M.; secs. 6, 7, 8, 17, 16, 15, 22, 23, 24, T. 21, N. R. 53, West of the 6th P. M.; side hill branch passes through secs. 34, 27, 35, 26, 36, T. 22, N. R. 54, West of the 6th P. M.; secs. 31, 33, 34, T. 22, N. R. 53, West of the 6th P. M.; secs. 6, 5, 4, 3, 10, 2, 11, 1, T. 21, N. R. 53, West of the 6th P. M. in Scotts Bluff County Nebraska.

9th. That said ditch or canal covers and reclaims the following described lands, viz.: main ditch, E. $\frac{1}{2}$ sec. 33, S. W. $\frac{1}{4}$ sec. 33, S. E. $\frac{1}{4}$ sec. 33, S. $\frac{1}{2}$ sec. 34, S. W. $\frac{1}{4}$ sec. 35, T. 22, N. R. 54, W.; N. $\frac{1}{2}$ sec. 4, all of secs. 3, 2, 11, 12, 1; also N. $\frac{1}{2}$ sec. 13, T. 21, N. R. 54, West; sec. secs. 7, 8, N. $\frac{1}{2}$ sec. 18; secs. 17, 16, 9; N. $\frac{1}{2}$ S. E. $\frac{1}{4}$ sec. 21, secs. 10, 15, 22, W. $\frac{1}{2}$ sec. 27, secs. 11, 14, 23, N. $\frac{1}{2}$ sec. 26, secs. 12, 13, 24, N. $\frac{1}{2}$, S. E. $\frac{1}{4}$ sec. 25, T. 21, N. R. 53, West; side hill branch, N. E. $\frac{1}{4}$, N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 35, S. $\frac{1}{2}$ sec. 36, T. 22, N. R. 54, West; S. W. $\frac{1}{4}$ sec. 31, S. $\frac{1}{2}$ sec. 33, S. W. $\frac{1}{4}$ sec. 34, T. 22, N. R. 53; secs. 6, 5, 4, W. $\frac{1}{2}$ sec. 3, S. $\frac{1}{2}$ sec. 1, T. 21, N. R. 53, West, amounting in all to about 17,460 acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1st 1899.

435 3rd. The amount of the appropriation shall not exceed 249 $\frac{3}{7}$ cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth ($\frac{1}{70}$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st 1899.

W. R. AKERS,
State Engineer, Secretary.

Dated January 7, 1897.

436 Seventy-seventh. That on the seventh day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Castle Rock Irrigation Canal & Water Power Company, and made the same a matter of record in

his office, and forwarded a copy thereof to said The Castle Rock Irrigation Canal & Water Power Company; but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to the other claimants for water from said river; which said opinion is in words and figures following, to-wit:

437

Docket No. 921.

Opinion.

In the Matter of Claim, County Nos. 5 & 6; Scotts Bluff Co.; Claim Affidavit No. 119; Water Division No. 1-A; "Castle Rock Irrigation Canal," North Platte River.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation purposes, and is made by virtue of posting two notices of appropriation at the proposed point of diversion; the first on the 18th day of April 1889, and recorded in the office of the county clerk of Scotts Bluff County on the 25th day of April 1889; the second notice being posted on the 8th day of May 1889 and recorded on the 14th day of May 1889. The work of excavation and construction was begun on the 1st day of June 1889 in compliance with the provisions of the general irrigation law of 1889 then in force.

It appears and is hereby found and determined from the record in the matter of this claim:—

1st. That the name adopted for the ditch or canal is the "Castle Rock Irrigation Canal."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is the irrigation of lands.

4th. That the work of excavation and construction was begun on the 1st day of June 1889.

5th. That the priority of the appropriation dates from the 18th day of April 1889, when the notice of appropriation was posted at the proposed point of diversion.

438 6th. (a) That the priority number of the appropriation for the water-shed is No. —, Water Division No. 1-A:

(b) That the priority number of the appropriation for the stream is No. —, North Platte River.

7th. That the ditch or canal heads on the south bank of the stream in the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 4, T. 21, N. R. 54, West of the 6th P. M.

8th. That said ditch or canal when completed will be about $19\frac{1}{4}$ miles in length and will pass through the following described lands, viz: secs. 4, 9, 10, 11, 14, 24, T. 21, R. 54; secs. 19, 30, 29, 28, 27, 33, 34, 35, 36, T. 21, R. 53; secs. 4, 9, 3, 2, 1, T. 20, R. 53.

9th. That said ditch or canal covers and reclaims the following described lands, viz: S. E. $\frac{1}{4}$ sec. 4, S. W. $\frac{1}{4}$ sec. 3, N. $\frac{1}{2}$ and S. E. $\frac{1}{4}$ sec. 10, S. W. $\frac{1}{4}$ sec. 11, N. $\frac{1}{2}$ sec. 14, S. E. $\frac{1}{4}$ sec. 14; S. $\frac{1}{2}$ sec.

13, N. $\frac{1}{2}$ N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$ sec. 24, all in T. 21, N. R. 54, West; secs. 19, 20, 28, 34, 35, 36, N. $\frac{1}{2}$ sec. 29, S. W. $\frac{1}{4}$ sec. 21, S. W. $\frac{1}{4}$ sec. 27, N. E. $\frac{1}{4}$ sec. 33, all in T. 21, N. R. 53, West; S. W. $\frac{1}{4}$ sec. 31, T. 21, N. R. 52, West; E. $\frac{1}{2}$ secs. 4, 9; N. $\frac{1}{2}$ sec. 15, secs. 1, 2, 3, 10, 11, 12, all in T. 20, R. 53, West of the 6th P. M. amounting in all to about 5,780 acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1st 1900.

3rd. The amount of the appropriation shall not exceed 82 $\frac{4}{7}$ cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further said appropriation 439 under any circumstances, shall be limited to one-seventieth (1/70) of one cubic foot per second of time, for each acre of land to which water has been actually and usefully applied on or before September 1st 1900.

W. T. AKERS,

State Engineer, Secretary.

Dated January 7, 1897.

440 Seventy-eighth. That on the seventh day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Central Irrigation Canal & Water Power Company, and made the same a matter of record in his office, and forwarded a copy thereof to said The Central Irrigation Canal & Water Power Company; but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said river, which said opinion is in words and figures following, to-wit:

441

Docket No. 926.

Opinion.

In the Matter of Claim, County Nos. 10 & 31; Scotts Bluff County; Claim Affidavit No. 246; Water Division No. 1-A; "Central Irrigation Canal & Water Power Company," North Platte River.

The Claim set forth in this record is for a right to the use of a portion of the waters of the North Platte River for irrigation purposes, and is made by virtue of posting two notices of appropriation at the proposed point of diversion; the first of said notices being posted on the 23rd day of June 1890, and filed on the office of the county clerk of Scotts Bluff county on the 25th day of June 1895; the second notice posted on the 10th day of November 1891, and filed on the 11th day of the same month in the office of the clerk of said

county; and a third and additional notice of appropriation posted on the 9th and filed on the 11th day of February 1893, in substantial compliance with the provisions of the general irrigation law of 1889.

It Appears, and is hereby found and determined from the record in the matter of this claim;

1st. That the name adopted for the ditch or canal is The Central Irrigation Canal & Water Power Company;

2nd. That the source of the appropriation is the North Platte River;

3rd. That the object of the appropriation is the irrigation of land;

442 4th. That the work of excavation and construction was begun on the 10th day of May 1890, and the works were completed on the 10th day of May 1892;

5th. That the priority of the appropriation dates from the 23rd day of June 1890 when the first notice of appropriation was posted at the proposed point of diversion;

6th. (a) That the priority number of the appropriation for the water-shed is No. — : Water Division No. 1-A:

(b) That the priority number of the appropriation for the stream is No. — : North Platte River;

7th. That the ditch or canal heads on the south bank of the stream in the northwest quarter of the woutheast quarter of section 27, T. 22, N. R. 55, West of the 6th P. M. in Scotts Bluff County, Nebraska.

8th. That the said ditch or canal is about 7 miles in length and passes through the following described lands, viz; sections 27, 26, 35 and 36 in T. 22, N. R. 55, West of the 6th P. M.; sections 1, T. 21, N. R. 55; sections 6, 7 and 5, T. 21, N. R. 54 West of the 6th P. M.

9th. That the ditch or canal covers and reclaims the following described lands, to-wit: Sections 27, 26, 35 and 36, T. 22, N. R. 55; sec. 1, T. 21, N. R. 55; secs. 30, 31, T. 22, N. R. 54; secs. 2, 3, 4, 5, 6, 7, 8, 9, and 10, T. 21 N. R. 54, amounting in all to about 2500 acres.

The claim is allowed, subject to the following limitations and conditions, viz;

1st. The water appropriated shall be used for the irrigation of land;

2nd. The time for completing the application of the water to the beneficial use indicated shall extend to September 1st 1900;

443 3rd. The amount of the appropriation shall not exceed thirty-six (36) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and further, that said appropriation under any circumstances shall be limited to one-seventieth of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st 1900.

W. R. AKERS,
State Engineer, Secretary.

Dated January 1st 1900.

444 Seventy-ninth. That on the eighth day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Nine Mile Canal & Reservoir Company, and made the same a matter of record in his office, and forwarded a copy thereof to said The Nine Mile Canal & Reservoir Company; but no copy or notice of said opinion or of the rendition of the same was ever, at any time, sent or given to any of the other claimants for water from said river; which said opinion is in the words and figures following, to-wit:

445

Docket No. 925.

Opinion.

In the Matter of Claim, County Nos. 12, 15 & 39, Scotts Bluff County; Claim Affidavit No. 221; Water Division No. 1-A; "Nine Mile Canal & Reservoir Company," North Platte River.

The claim set forth in this record is for a right to the use of a portion of the waters of the North Platte River for irrigation purposes, and is made by virtue of posting a notice of appropriation at the proposed point of diversion on the 6th day of December 1893, and filing the same for record in the office of the county clerk of Scotts Bluff County on the 9th day of December 1893, and commencing the construction of a proposed ditch or canal in compliance with the provisions of the general irrigation law of 1889.

It Appears and is hereby found and determined from the record in the -atter of this claim;

1st. That the name adopted for the ditch or canal is The Nine Mile Canal & Reservoir Company:

2nd. That the source of the appropriation is the North Platte River;

3rd. That the object of the appropriation is the irrigation of land:

4th. That the work of excavation and construction was begun on the 15th day of October 1893, and the works completed on or before April 15th, 1896.

5th. That the priority of the appropriation dates from the 6th day of December 1893, when the notice of appropriation was posted at the proposed point of diversion:

446 6th. (a) That the priority number of the appropriation from the watershed is No. —; Water Division No. 1 A:

(b) That the priority number of the appropriation for the stream is No. —; North Platte River:

7th. That the ditch or canal heads on the north bank of the stream in the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 18, T. 21, N. R. 53 West of the 6th P. M.; in Scotts Bluff County, Nebraska:

8th. That the said ditch or canal is about twenty-two and a half miles in length and passes through the following described sections of land, viz; Sections 17, 16, 10, 15, 14, and 13, T. 21, N. R. 53 West; Sections 19, 20, 29, 28, 27, 26, 35 and 36 T. 21 N. R. 52

West; Secs. 31, 32 and 33, T. 21, N. R. 51 West; Sections 2 and 1, T. 20, N. R. 52 West; and sections 6, 5, and 4; T. 20, N. R. 51 West.

9th. That the said ditch or canal covers and reclaims the following described lands, viz; the S. W. $\frac{1}{4}$ of sec. 16; the E. $\frac{1}{2}$ of sec. 16 the N. $\frac{1}{2}$ of sec. 21, the S. E. $\frac{1}{4}$ of sec. 21, all of secs. 15 and 22, N. $\frac{1}{2}$ of sec. 27, N. $\frac{1}{2}$ of sec. 26, all of sec. 23, S. $\frac{1}{2}$ of sec. 14, S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of sec. 13, all of sec. 24, N. $\frac{1}{2}$ of 25, E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of sec. 25, all in T. 21, N. R. 53, West of the 6th P. M. in Scotts Bluff County, Nebraska. On- half of sec. 19, N. $\frac{1}{2}$ of sec. 30, N. W. $\frac{1}{4}$ of sec. 29, E. $\frac{1}{2}$ of sec. 28, N. E. $\frac{1}{4}$ of sec. 33, N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of sec. 34, S. $\frac{1}{2}$ of sec. 27, S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of sec. 27, all in T. 21, N. R. 52 West, in Cheyenne County, Nebraska. All of section 5, in T. 20, N. R. 52 West: S. $\frac{1}{2}$ of sec. 35, N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 35, S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of sec. 35, S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 35, S. $\frac{1}{2}$ of sec. 36, T. 21, N. R. 52 West. S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of sec. 2, N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 2, S. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of sec. 1, N. E. $\frac{1}{4}$ of sec. 1, T. 20, N. R. 52 West; N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of sec. 31, S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of sec. 31, all of sec. 32, T. 21, N. R. 51 West; N. W. $\frac{1}{4}$ of of sec. 6, W. $\frac{1}{2}$ 447 of the N. E. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of sec. 6, all of secs. 7 and 8, S. $\frac{1}{2}$ of sec. 5, S. $\frac{1}{2}$ of sec. 4, N. E. $\frac{1}{4}$ of sec. 9, S. $\frac{1}{2}$ of sec. 9, T. 20, R. 51 west of the 6th P. M. amount in all to about 14,000 acres.

The claim is allowed subject to the following limitations and conditions, viz;

1st. The water appropriated shall be used for the purpose of irrigation;

2nd. The time for completing the application of the water to the beneficial use indicated shall extend to September 1st 1900;

3rd. The amount of the appropriation shall not exceed two hundred (200) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances shall be limited to one-seventieth ($\frac{1}{70}$) of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1st 1900.

Dated January 8, 1897.

W. R. AKERS,
State Engineer, Secretary.

448 Eightieth. That on the 13th day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Winters Creek Irrigation Company and made the same a matter of record in his office, and forwarded a copy thereof to said The Winters Creek Irrigation Company; but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said river, which said opinion is in words and figures following, to-wit:

449

Docket No. 952.

Opinion.

In the Matter of Claim, County No. —; Scotts Bluff County; Claim Affidavit No. 253; Water Division No. 1-A; Robert J. Harshman, Claimant, North Platte River.

The claim set forth in this record *id* for a right to the use of a portion of the water of the North Platte River for irrigation purposes, and is made by virtue of posting a notice of appropriation at the proposed point of diversion, and the construction of a ditch and use of water before the passage of the St. Raynor Law.

It Appears and is hereby found and determined from the record in the matter of this claim:—

1st. That the name adopted for the ditch or canal is the "Winters Creek Canal."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is the irrigation of lands.

4th. That the work of excavation and construction was begun on the 15th day of November 1888.

5th. That the priority of the appropriation dates from the 18th day of October 1888, when a notice of appropriation was posted at the proposed point of diversion, and the actual work of surveying and construction was begun.

6th. (a) That the priority number of the appropriation for the water-shed is No. —: Water Division No. 1-A:

450 (b) That the priority number of the appropriation for the stream is No. —, North Platte River.

7th. That said ditch or canal heads on the north bank of the stream in the N. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 17, T. 22, N. R. 55, West of the 6th P. M.

8th. That said ditch or canal is about 12 miles in length and passes through the following described lands, viz: secs. 17, 16, 15, 22, 23, 14, 13, T. 22 N. R. 55, West; secs. 19, 20, 21, 28, 27, 26, 35, T. 22, N. R. 54, West of the 6th P. M.

9th. That said ditch or canal covers and reclaims the following described lands, viz: sec. 21, S. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of sec. 16, S. $\frac{1}{2}$ of sec. 22, S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of sec. 22, S. $\frac{1}{2}$ of sec. 23, N. E. $\frac{1}{4}$ of sec. 23, S. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ of sec. 23, part of the S. W. $\frac{1}{4}$ of sec. 13, part of the S. E. $\frac{1}{4}$ of sec. 14, W. $\frac{1}{2}$ of sec. 24, S. E. $\frac{1}{4}$ of sec. 24, S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 24, N. $\frac{1}{2}$ of sec. 25, S. E. $\frac{1}{4}$ of sec. 25, part of the S. W. $\frac{1}{4}$ of sec. 25, T. 22, N. R. 55 West of the 6th P. M.; S. $\frac{1}{2}$ of sec. 19, S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of sec. 19, all of sec. 30, N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of sec. 31, S. W. $\frac{1}{4}$ of sec. 20, S. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of sec. 20, all of sec. 29, N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of sec. 32, S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 32, S. $\frac{1}{2}$ and N. W. $\frac{1}{4}$ of sec. 28, S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of sec. 28, S. E. $\frac{1}{4}$ of sec. 28, all of sec. 33, 34 and 35; S. $\frac{1}{2}$ of S. $\frac{1}{2}$ of sec. 27, N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of sec. 27, part of the N. $\frac{1}{2}$ of S. E. $\frac{1}{4}$ of sec. 27, sec. 35, part of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 26,

T. 22, N. R. 54, West, and any and all other lands lying between the line of this ditch and the North Platte River, not already granted by William A. Hale, amounting in all to about 8,700 acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

451 2nd. The time for completing the application of water to the beneficial use indicated, shall extend to September 1st 1899.

3rd. The amount of the appropriation shall not exceed 124 $\frac{2}{7}$ cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth ($\frac{1}{70}$) of one cubic foot per second of time, for each acre of land to which water has been actually and usefully applied on or before September 1st 1899.

W. R. AKERS,
State Engineer, Secretary.

Dated January 18, 1897.

452 Eighty-first. That on the 26th day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of Yorick Nichols and Carrol Nichols, and made the same a matter of record in his office, and forwarded a copy thereof to said Yorick Nichols and Carrol Nichols, but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said river; which said opinion is in words and figures following, to-wit:

453 Docket No. 245.

Opinion.

In the Matter of Claim, County No. 34; Scotts Bluff County Claim, Affidavit No. 276; Water Division No. 1-A; Yorick Nichols and Carroll Nichols, Claimants, North Platte River.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation purposes, and is made by virtue of posting a notice of appropriation at the proposed point of diversion on the 20th day of March 1893, filing the same for record with the county clerk of Scotts Bluff County on the 24th day of March 1893 in compliance with the provisions of the general irrigation law of 1889, then in force.

It appears and is hereby found and determined from the record in the matter of this claim:—

1st. That the name adopted for the ditch or canal is the "Rams-horn Ditch."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is the irrigation of lands.

4th. That the work of excavation and construction was begun on the 1st day of April 1893 and the works were completed on or before the 1st day of April 1895.

5th. That the priority of the appropriation dates from the 20th day of March 1893, when a notice of appropriation was posted at the proposed point of diversion.

454 6th. (a) That the priority number of the appropriation for the water-shed is No. —, Water Division No. 1-A:

(b) That the priority number of the appropriation for the stream is No. —, North Platte River.

7th. That the ditch or canal heads on the north bank of the stream in the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 13, T. 23, N. R. 58, West of the 6th P. M.

8th. That said ditch or canal is about six (6) miles in length and passes through the following described lands, viz: sec. 18, 19, 20, 21, 22, 14, T. 23, N. R. 57, West.

9th. That said ditch or canal covers and reclaims the following described lands, viz: N. E. $\frac{1}{4}$ of sec. 19, T. 23, N. R. 57, West of the 6th P. M. N. W. $\frac{1}{4}$ of sec. 20, T. 23, N. R. 57, West. S. $\frac{1}{2}$ of sec. 21, part of the N. E. $\frac{1}{4}$ of sec. 21, S. $\frac{1}{2}$ of sec. 22, part of the N. $\frac{1}{2}$ of sec. 22, all of secs. 23 and 24, part of the S. $\frac{1}{2}$ of sec. 14, and part of the S. $\frac{1}{2}$ of sec. 13, T. 23, R. 57, West of the 6th P. M., and all the lands lying between the line of said ditch and the North Platte River so far east as the range line between the ranges 57 and 56, not already granted by the Farmers Canal Company, amounting in all to 3,200 acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1st 1899.

3rd. The amount of the appropriation shall not exceed 45 $\frac{5}{7}$ cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production
455 of crops in the exercise of good husbandry; and, further, said appropriation, under any circumstances, shall be limited to one-seventieth ($\frac{1}{70}$) cubic foot per second of time, for each acre of land to which water has been actually and usefully applied on or before September 1st 1899.

W. R. AKERS,
State Engineer, Secretary.

Dated January 26, 1897.

456 Eighty-first & one-half. That on the 28th day of January, 1897, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Browns Creek Irrigation

Canal Company, and made the same a matter of record in his office and forwarded a copy thereof to said company; but no copy or notice of said opinion or of the rendition of the same was ever, at any time, sent or given to any of the other claimants for water from said river, which said opinion is in words and figures following, to-wit:

457

Docket No. 857.

Opinion.

In the Matter of Claim, County Nos. 78 & 87; Cheyenne Co.; Claim Affidavit No. 47; Water Division No. 1-A; Browns Creek Irrigation Canal Co., Claimant, North Platte River.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation purposes, and is made by virtue of posting a notice of appropriation at the proposed point of diversion on the 20th day of January 1892, filing the same with the county clerk of Cheyenne County on the 23rd day of January 1892.

It Appears and is hereby found and determined from the record in the matter of this claim:—

1st. That the name adopted for the ditch or canal is the "Browns Creek Irrigation Canal Co."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is the irrigation of lands.

4th. That the work of excavation and construction was begun on the 20th day of January 1892.

5th. That the priority of the appropriation dates from the 20th day of January 1892, when a notice of appropriation was posted at the proposed point of diversion.

6th. (a) That the priority number of the appropriation for the water-shed is No. —, Water Division No. 1-A:

458 (b) That the priority number of the appropriation for the stream is No. —, North Platte River.

7th. That said ditch or canal heads on the north bank of the stream in the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sec. 29, T. 20, N. R. 50, West of the 6th P. M.

8th. That said ditch or canal is about twenty-three (23) miles in length and passes through the following described lands, viz: secs. 29, 28, 27, 34, 35, T. 20, N. R. 50, West; Secs. 1 & 2, T. 19, R. 50, West; secs. 6, 5, 4, 3, 10, 11, 12, 13, T. 19, R. 49, West; secs. 18, 17, 16, 9, 10, 15, 14, 23, 24, 25, T. 19, R. 48, West of the 6th P. M.

9th. That said ditch or canal covers and reclaims the following described lands, viz: parts of secs. 28, 27, 35, T. 20, N. R. 50, West of the 6th P. M.; part of secs. 1 & 2, T. 19, N. R. 50, West; part of N. $\frac{1}{2}$ of secs. 18, 19, 17, 20, 9, 16, 21, 28, 10, 15, 22, 27, 34;

secs. 14, 23, 26, 35, 24, 25, 36, T. 19, N. R. 48, West, amounting in all to about 13,000 acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1st 1902.

3rd. The amount of the appropriation shall not exceed 188 5/7 cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal, nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth (1/70) of one cubic foot per second of time, for each acre of land to which water has been actually and usefully applied on or before
459 September 1st 1902.

W. R. AKERS,
State Engineer, Secretary.

Dated January 28, 1897.

460 Eighty-second. That on the seventh day of April, 1897, the State Board of Irrigation, without sending any notice to the claimants of appropriations of water from said river, or any of them, and without the knowledge of any of said claimants, other than constructive notice, if any, that may be imputed by law, caused a resolution to be entered on its records which said resolution, in so far as it pertains to the above mentioned opinions, is in words and figures following, to-wit:

461 Office of State Board of Irrigation, Lincoln, Nebraska.

April 7, 1897.

The State Board of Irrigation met at the office of the Secretary.

Present:

Governor S. A. Holcomb, President.

J. V. Wolfe, Commissioner of Public Lands & Buildings.

E. P. Smith, Deputy Attorney General.

Secretary W. R. Akers, stated that he had passed upon 315 cases since the last meeting of the Board, from which no appeals had been taken.

Upon motion of E. P. Smith the findings of the Secretary from which appeals were not taken, were affirmed in the following cases:

Docket No. 819. Chimney Rock Irrigation Canal & Water Power Company, Cheyenne County; Affirmed.

Docket No. 832. Belmont Irrigating Canal & Water Power Company, Cheyenne County; Affirmed.

Docket No. 918. Farmers' Canal Company, Scotts Bluff County; Affirmed.

Docket No. 919. Minatare Mutual Canal & Irrigation Company, Scotts Bluff County; Affirmed.

Docket No. 920. Enterprise Ditch Company, Scotts Bluff County; Affirmed.

Docket No. 925. Nine Mile Canal & Reservoir Company, Scotts Bluff County; Affirmed.

Docket No. 926. Central Irrigation Canal & Water Power Company, Scotts Bluff County; Affirmed.

Docket No. 945. Carrol Nichols, Yorick Nichols, Scotts Bluff County; Affirmed.

Docket No. 952. Winters Creek Irrigation Company, Scotts Bluff County; Affirmed.

Docket No. 857. Browns Creek Irrigation Canal Company, Cheyenne County; Affirmed.

W. R. AKERS,
State Engineer, Secretary.

462 Approved:
 SILAS A. HOLCOMB.

(Castle Rock Claim seems to have been finally approved on September 22, 1897.)

463 Eighty-third. That neither the State Board of Irrigation, nor its Secretary, nor any officer of said Board, did, within thirty days from the adoption of said resolution set out in the preceding paragraph, or at any other time, notify any claimant of water from said river of the adoption of said resolution, and neither the plaintiff nor any of the cross-petitioners in this action acquired any knowledge or information concerning said resolution for several years after the adoption thereof.

Eighty-fourth. That on the tenth day of August, 1898, the Secretary of the State Board of Irrigation rendered an opinion on said claim of The Belmont Irrigation Canal & Water Power Company, and made the same a matter of record in his office, and forwarded a copy thereof to said The Belmont Irrigation Canal & Water Power Company; but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said river, which said opinion is in words and figures following, to-wit:

464 Docket No. 828.

Opinion.

In the Matter of Claim, County No. 44; Cheyenne County; Claim Affidavit No. 275; Water Division No. 1-A; Platte Watershed, North Platte River; The Belmont Irrigating Canal & Water Power Company, Claimant.

The record in the matter of this claim consists of:

1st. A copy of a notice of appropriation posted at the point of

diversion on the 19th day of December 1889, a copy of which was filed with the County Clerk of Cheyenne County on the 23rd day of December, 1889.

2nd. Claim Affidavit No. 275, Water Division No. 1-A, filed in the Office of the State Board of Irrigation on the 30th day of September 1895.

The claim set forth in this record *id* for a right to the use of a portion of the water of the North Platte River for irrigation, power and domestic uses, and is made by virtue of rights deemed to have been acquired by posting a notice at the point of diversion on the 19th day of December 1889, and filing said notice with the County Clerk of Cheyenne County on the 23rd day of December 1889.

It appears and is hereby found and determined from the record in the matter of this claim:

1st. That the name adopted for the ditch or canal is the "Belmont Irrigating Canal & Water Power Company's Canal."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is irrigation, water power and domestic use.

465 4th. That a notice of appropriation was posted at the point of diversion on the 19th day of December 1889 and that a copy of said notice was filed with the County Clerk of Cheyenne County on the 23d day of December 1889.

5th. That the work of excavation and construction was begun on the 19th day of December 1889 and completed on the 1st day of December 1892.

6th. That the priority of the appropriation dates from the 19th day of December 1889, on which date notice was posted at the point of diversion.

7th. That said ditch or canal heads on the south bank of the stream in the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 18, T. 20, R. 51, west of the 6th P. M.

8th. That said ditch or canal is about forty (40) miles in length and passes through the following described lands, viz; secs. 18, 19, 20, 21, 28, 27, 26, 25, & 36, T. 20, N. R. 51, west of the 6th P. M.; sec. 31, T. 20, N. R. 50, west of the 6th P. M.; secs. 6, 5, 8, 9, 10, 15, 14, 23 & 24, T. 19, N. R. 50, west of the 6th P. M.; secs. 19, 20, 21, 28, 27, 34, 35, & 36, T. 19, N. R. 49, west of the 6th P. M.; sec. 1, T. 18, N. R. 49, west of the 6th P. M.; secs. 6, 5, 8, 9, 16, 15, 22, 23, 24, T. 10, N. R. 48, west of the 6th P. M.; secs. 19, 20, 29, 28, 27, 34, 26 & 25, T. 18, N. R. 47, west of the 6th P. M.

9th. That the capacity of said ditch or canal is about two hundred and seventy (270) cubic feet per second.

10th. That said ditch or canal covers and reclaims the following described lands, viz; parts of secs. 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 & 36, T. 20, N. R. 51, west of the 6th P. M.; parts of secs. 19, 29, 31, 33 & 34, and all of secs. 30 & 32, T. 20, R. 50;
466 parts of secs. 2, 3, 5, 6, 8, 9, 10, 12, 14, 15, 23 & 24, and all of secs. 4, 11, & 13, T. 19, N. R. 50, west of the 6th P. M.; parts of secs. 7, 15, 16, 17, 19, 20, 23, 24, 25, 27, 28, 34, 35 & 36;

all of secs. 18, 21, 22 & 26, T. 19, N. R. 49 W.; part of sec. 1, T. 18, N. R. 49 W.; parts of secs. 29, 30, 33 & 34 and all of secs. 31 & 32, T. 19, R. 48; parts of secs. 3, 5, 6, 8, 9, 11, 12, 15, 16, 22, 23 & 24 and all of secs. 4, 10, 13 & 14, T. 18, N. R. 48 W.; parts of secs. 7, 8, 9, 10, 15, 19, 20, 23, 24, 25, 26, 27, 28, 29 & 34 and all of secs. 16, 17, 18, 21 & 22, T. 18, N. R. 47, west of the 6th P. M., or those portions of the legal subdivisions of land above enumerated, which can be watered from the above described ditch or canal, amounting in all to about thirty-five thousand (35,000) acres.

The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of irrigation, water power and domestic use.

2nd. The prior rights of the owners of land bordering on this stream or through which this stream flows to so much of the natural flow of the stream as is necessary for domestic uses, including stock water, must be respected.

3rd. The time for completing the application of water to the beneficial use indicated, shall extend to September 1, 1900.

4th. The amount of the appropriation shall not exceed two hundred and seventy (270) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation, under any circumstances, shall be limited to one-seventieth ($1/70$) of a cubic foot per second of time for each acre of land to which water is actually and usefully applied on or before September 1, 1900.

467

J. W. WILSON,
State Engineer, Secretary.

Dated August 10, 1898.

468 Eighty-fifth. That on the 12th day of August, 1898, the Secretary of the State Board of Irrigation rendered an opinion on the said claim of The Alliance Irrigation Canal & Water Power Company and made the same a matter of record in his office, and forwarded a copy thereof to said The Alliance Irrigation Canal & Water Power Company; but no copy or notice of said opinion, or of the rendition of the same, was ever at any time sent or given to any of the other claimants for water from said North Platte River; which said opinion is in words and figures, following, to-wit:

Opinion.

In the Matter of the Claim, County No. 100. Cheyenne County.
Claim Affidavit No. 172. Water Division No. 1-A. Platte Water-
shed. North Platte River.

Alliance Irrigating Canal & Water Power Co.

The record in the matter of this claim consists of:

1st. A copy of a notice of appropriation posted at the point of diversion on the 26th day of December 1892, a copy of which was filed with the County Clerk of Cheyenne County on the 21st day of December 1892.

2nd. Claim affidavit No. 100, Water Division No. 1-A, filed in the office of the State Board of Irrigation on the 17th day of July 1895.

3rd. Testimony given concerning this claim at hearing before the State Board of Irrigation at Bayard, Nebraska, on the 14th day of July 1896, W. R. Akers, State Engineer, Secretary, presiding.

4th. Report of R. P. Scott, Assistant State Engineer, as to the amount of land irrigated and extent and condition of works.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation, water power and domestic uses, and is made by virtue of rights deemed to have been acquired by posting a notice of appropriation at the point of diversion on the 26th day of December 1892, and filing said notice with the County Clerk of Cheyenne County on the 31st day of December of the same year.

470 It appears and is hereby found and determined from the record in the matter of this claim:—

1st. That the name adopted for the ditch or canal is the "Alliance Irrigating Canal."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is irrigation.

4th. That a notice of appropriation was posted at the point of diversion on the 26th day of December 1892 and that a copy of said notice was filed with the County Clerk of Cheyenne County on the 31st day of December of the same year.

5th. That the work of excavation and construction was begun on the 30th day of December 1891.

6th. That the priority of the appropriation dates from the 26th day of December 1892, on which date notice was posted at the point of diversion.

7th. That said ditch or canal heads on the north bank of the stream in the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 5, T. 20, N. R. 53, west of the 6th P. M.

8th. That said ditch or canal is about twelve (12) miles in length and passes through secs. 5 & 4, T. 20, R. 52, secs. 35 & 36, T. 21,

R. /2, secs. 2 & 1, T. 80, R. 52, secs. 6, 5, 8, & 9, T. 20, N. R. 51, west of the 6th P. M.

9th. That the capacity of this canal as constructed is for the first mile, about 103 cubic feet per second. For the next three miles, about forty-one cubic feet per second, and at the beginning of the fifth mile, about seventy-four cubic feet per second.

10th. That said ditch or canal covers and reclaims parts of the following described lan-s, viz: secs. 4, 3, 2, 1, 11, & 12, T. 20, 471 R. 52; secs. 35 & 36, T. 21, R. 52; secs. 6, 7, 8, 9, 10, 15, 16, 17 & 18, T. 20, N. R. 51, west of the 6th P. M., or those portions of the legal subdivisions of land above enumerated, which can be watered from the above described ditch or canal, amounting in all to about seven thousand (7,000) acres.

The claim is allowed subject to the following limitations and conditions, viz;

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The prior rights of the owners of lands bordering on this stream or through which this stream flows to so much of the natural flow of the stream as is necessary for domestic uses, including stock water, must be respected.

3rd. The time for completing the application of water to the beneficial use indicated, shall extend to September 1st, 1900.

4th. The amount of the appropriation shall not exceed one hundred (100) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation, under any circumstances, shall be limited to one-seventieth (1/70) of a cubic foot per second of time for each acre of land to which water is actually and usefully applied on or before September 1st, 1900.

Dated August 12, 1898.

J. W. WILSON,
State Engineer, Secretary.

472 Eighty-sixth. That on the 13th day of September, 1898, the Secretary of the State Board of Irrigation rendered on opinion on the said claim of The Chimney Rock Irrigation Canal & Water Power Company, and made the same a matter of record in his office, and forwarded a copy thereof to said The Chimney Rock Irrigation Canal & Water Power Company, but no copy or notice of said opinion or of the rendition of the same was ever, at any time, sent or given to any of the other claimants for water from said river, which said opinion is in words and figures following, to-wit:

473

Docket No. 844.

Opinion.

In the Matter of Claim, County Nos. 63 & 16, Cheyenne County.
Claim Affidavit No. 81. Water Division No. 1-A. Platte Watershed. North Platte River.

Chimney Rock Irrigation Canal & Water Power Co., Claimant.

The record in the matter of this claim consists of:—

1st. A notice of appropriation posted at the point of diversion on the 3rd day of December, 1899, copies of which were filed with the County Clerks of Scotts Bluff and Cheyenne Counties on the 10th day of December, 1890.

2nd. Claim Affidavit No. 81, Water Division No. 1-A, filed in the office of the State Board of Irrigation on the 28th day of June, 1895.

3rd. Testimony given concerning this claim at hearing before the State Board of Irrigation on the 14th day of July, 1896, at Bayard, Nebraska, W. R. Akers, State Engineer, Secretary, presiding.

4th. Certificate of Under Assistant, R. H. Willis, as to the extent and capacity of this canal, and as to the amount of land irrigated and susceptible of irrigation.

The claim set forth in this record is for a right to the use of a portion of the water of the North Platte River for irrigation, and is made by virtue of rights deemed to have been acquired by posting a notice at the point of diversion on the 3rd day of December 1890, and filing copies of said notice with the County Clerks of Scotts Bluff and Cheyenne Counties on the 10th day of December, 1890.

474 It appears and is hereby found and determined from the record in the matter of this claim;—

1st. That the name adopted for the ditch or canal is the "Chimney Rock Canal."

2nd. That the source of the appropriation is the North Platte River.

3rd. That the object of the appropriation is Irrigation.

4th. That a notice of appropriation was posted at the point of diversion on the 3rd day of December, 1890, and that a copy of said notice was filed with the County Clerk of Scotts Bluff County on the 10th day of December, 1890.

5th. That the work of excavation and construction was begun in the year 1889.

6th. That the priority of the appropriation dates from the 3rd day of December, 1890, on which date notice was posted at the point of diversion.

7th. That said ditch heads on the south bank of the stream in the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of sec. 1, T. 20 N. R. 53 west of the 6th P. M.

8th. That said ditch is about sixteen and seven-eighths ($16\frac{7}{8}$) miles in length and the main line and north branch passes through

sec. 1, T. 20 N. R. 53 W.; secs. 6, 7, 8, 9, 16, 15, and 14, T. 20, N. R. 52 W.; and the south branch passes through secs. 7, 8, 17, 16, 21, 22, 26, 25, 24 and 13, T. 20 N. R. 52 W.; secs. 30, 29 and 19 T. 20 N. R. 51 West of the 6th P. M.

9th. That said ditch or canal covers and reclaims parts of the following described lands, viz; secs. 7, 8, 9, 17, 16, 21, 22, 15, 10, 14, 23, 24, and 25, T. 20 N. R. 52 W.; secs. 30 and 19, T. 20, N. R. 51 West of the 6th P. M., or those portions of the legal subdivisions of land above enumerated which can be watered from the above described ditch or canal, amounting in all to about six thousand seven hundred fifty (6750) acres.

475 The claim is allowed subject to the following limitations and conditions, viz:

1st. The water appropriated shall be used for the purpose of Irrigation.

2nd. The prior right of the owners of land bordering on this stream or through which this stream to so much of the natural flow of the stream as is necessary for domestic uses including stock water, must be respected.

3rd. The time for completing the application of water to the beneficial use indicated shall extend to September 1st, 1899.

4th. The amount of the appropriation shall not exceed sixty (60) cubic feet per second of time, neither shall it exceed the capacity of said ditch or canal nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry; and, further, said appropriation under any circumstances, shall be limited to one-seventieth or a cubic foot per second of time for each acre of land to which water is actually and usefully applied on or before September 1st, 1899.

J. M. WILSON,

State Engineer, Secretary.

Dated Sept. 13, 1898.

476 Eighty-seventh. That on the second day of January, 1889, the State Board of Irrigation, without sending any notice to the claimants of appropriations of water from said river, or either of them, and without the knowledge of any of said claimants, other than constructive notice, if any may be imputed by law, caused a resolution to be entered on its records similar in all respects to the resolution heretofore set out, in paragraph eighty-two, affirming the opinion of the Secretary of the State Board of Irrigation on the claims of The Belmont Irrigation Canal & Water Power Company, The Alliance Irrigation Canal & Water Power Company, The Chimney Rock Irrigation Canal & Water Power Company, and other opinions therein mentioned.

Eighty-eighth. That neither the State Board or its Secretary or any officer of said Board did, within thirty days from the adoption of the resolution mentioned in the preceding paragraph, or at any other time, notify any claimant of water from said river of the adoption of said resolution, and neither of the parties to this action

acquired any knowledge or information concerning the same for several years after the adoption thereof.

Eighty-ninth. That no copy of either of the claims above mentioned, or of either of the opinions above mentioned, or of the resolutions of the State Board above mentioned, or either of them, was ever at any time forwarded by said Board, or its secretary, or any officer thereof, to the County Clerk of Scotts Bluff County, Nebraska or any other county; nor was any certificate, signed by the president and secretary, of said Board or either of them, or otherwise containing the name or post-office address of any of the parties to this action, or the priority of their respective appropriations, or either of them, or the amount of water appropriated by them, or any of them, or
477 the amount of prior appropriations, or any other information with reference to said claims, or either of them, ever transmitted to the county clerk of Scotts Bluff County, Nebraska, or to the county clerk of any other county in said state, by the State Board of Irrigation, or its Secretary, or any officer thereof; nor was any of said documents ever filed or recorded in the office of the county clerk of Scotts Bluff County, or of the county clerk of any other county in said state, except the opinion of the Secretary of the State Board of Irrigation with reference to the claim of The Farmers' Canal Company, which was filed in the office of the county clerk of Scotts Bluff county, Nebraska, by the successors of The Farmers' Canal Company, on the 27th day of December, 1905, and recorded in said office on said day.

Ninetieth. That said Farmers Canal Company having failed to pay either the interest or the principal of the bonds sold by it, the trustee, by reason of default in said payment, in the year 1898 commenced an action in the Circuit Court of the United States for the District of Nebraska against The Farmers Canal Company for the foreclosure of said trust deed; and such proceedings were had therein that a decree was entered foreclosing the said trust deed and ordering a sale of the said canal, water rights, privileges, franchises, immunities and property of The Farmers Canal Company; that on or about the 23rd day of December 1901, said canal of The Farmers Canal Company, together with all its property, rights, privileges, franchises and immunities were sold under said decree of foreclosure to one Roberts Walker, the sale thereof being confirmed and the Master's deed delivered to said Roberts Walker in February 1902. That said decree and the Master's deed based thereon, described the property foreclosed and conveyed by said Master's deed as follows:

478 The water rights and all right, title and interest therein, as acquired by the appropriation made by the party of the first part, under the laws of the United States and the State of Nebraska, of and to the waters of the North Platte River at a point where the north boundary line of Section 10 in Township 23, north of range 58 west, intersects the east bank of said river in Scotts Bluff County, State of Nebraska, and any and all easements acquired thereby and by the continued development thereof, and all franchises, rights and privileges, now or hereafter to be acquired of every kind, name

and description; also the water rights, and all right, title and interest now owned or hereafter to be acquired to the waters of the North Platte River in Scotts Bluff County, in the State of Nebraska, and of and to the waters of any other stream, spring, river or other source of water supply. Also all water power, canals, conduits, branches, reservoirs, reservoir sites, additions and extensions, aqueducts and bridges, pertaining therein, including the rights-of-way, canal bed, superstructures, whether now constructed or acquired, or hereafter to be constructed or acquired, and also all houses, water pipes, dams, headwork, machinery, plant, equipment, shops or other structure or buildings now used or erected, or hereafter to become used or erected in connection with any of said work, canal branches, or any canals or branches, or any canals or branches hereafter to be constructed; also all supplies, stationery, furniture, fixtures, material for construction, maintaining, operating, repairing or replacing, or for the betterment or improvement of any of said canals, lateral or extension, or any part of their appurtenances; also all rights, powers, privileges, immunities and franchises connected with or relating to said canal or laterals, or the construction, maintainance, operating, improvement or extension thereof,

479 and all other property now held or belonging to, or that may hereafter be acquired by this company including that of every kind and nature pertaining to said canals and laterals, or any of them, now held by the party of the first part, or hereafter to be acquired; the intention of this indenture is specifically to include hereby and convey the water rights, line of canal and other works, together with all and singular the hereditaments belonging to the above described and granted premises, and the rents, revenues, tolls, incomes, issues and profits, property, claims and demands whatsoever, as well as in law as in equity, including the proceeds of sales of water rights or power in and to the premises and every part thereof.

That on or about the 14th day of April 1902, one William Frank filed in the office of the Secretary of the State Board of Irrigation, an application for a permit to appropriate two thousand cubic feet of water per second of time from the North Platte River, for irrigation purposes, proposing to construct a canal 150 miles long and to irrigate therefrom 150,000 acres of land, the point of diversion of the water from said river and the line of the proposed canal being substantially that of The Farmers Canal Company; that protests against the said application of William Frank were filed by The Farmers Canal Company and Roberts Walker, who claimed to have a prior appropriation to irrigate the same lands described in the application of said William Frank for a distance of about 80 miles from the headgate of The Farmers Canal Company; That The Farmers Irrigation District intervened therein and filed its petition in the words and figures following, to-wit:

480 Before the State Board of Irrigation for the State of Nebraska.

In the Matter of the Application No. 660, of William Frank, Filed on April 14, 1902, for the Appropriation of Waters of the North Platte River.

I.

Comes now the Farmers Irrigation District, your petitioner herein, and shows to the Honorable State Board of Irrigation that a proceeding is now pending before this Honorable Board, entitled "In the matter of the application, No. 660, of William Frank, filed on April 14, 1902, for the appropriation of waters of the North Platte River."

That in said proceeding the Farmers Canal Company and Roberts Walker, who have an appropriation allowed, contest the right of William Frank to an appropriation of water from the North Platte River to irrigate land included in the appropriation granted to the Farmers Canal Company and Roberts Walker, on the ground that said parties have a prior appropriation therefor. And said William Frank on his part contests the appropriation of the Farmers Canal Company and Roberts Walker on the ground that said Farmers Canal Company and said Roberts Walker have not completed their said canal with the necessary diligence, and by reason thereof have forfeited their said appropriation, except so much thereof as is sufficient to irrigate five thousand acres, that being the amount of land susceptible of being irrigated from the said canal of the Farmers Canal Company and Roberts Walker.

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2.

Your petitioner further represents that it is a corporation organized as an irrigation district under Article 3 of Chapter 93a of the Statutes of the State of Nebraska: that it includes within its boundaries about fifty thousand acres of land, susceptible of being irrigated by an irrigating canal, taking water from the North Platte River in Scotts Bluff County, Nebraska, and which said territory is included and described in its application No. 675, filed on the day of June, 1902; and by reference made a part hereof that the territory included in the application of your petitioner is also included in the application No. 660 of William Frank, and is also included in the appropriation of water allowed by this Honorable Board to the Farmers Canal Company and Roberts Walker. That the purpose for which your petitioner was organized is to construct and operate an irrigating canal, as provided by said Article 3 of Chapter 93a and to irrigate the lands included in its application for water, and which said lands constitute and comprise the said irrigation district as so organized.

3.

That in order to construct and operate its irrigation canal as aforesaid, your petitioner duly voted and authorized to be issued its bonds in the sum of \$400,000.00, and which said amount is

amply sufficient to enable your petitioner to construct said canal and to perform the duties and functions for which it was organized. That its said bonds, as aforesaid, have been declared valid and their issuance authorized in all respects as required by law by the Supreme Court of the State of Nebraska, and that the only thing necessary to enable your petitioner to proceed at once to the construction of its said canal is an appropriation of water, for which its application No. 675, has been filed as aforesaid. And your petitioner alleges that there is unappropriated water in the North Platte River sufficient to supply the application filed by your petitioner.

4.

Your petitioner further alleges that the canal of the Farmers Canal Company and Roberts Walker was originally intended to irrigate the land described in your petitioner's application, and constituting the Farmers Irrigation District, but that the said Farmers Canal Company or Roberts Walker never completed said canal; that said canal as it was originally proposed to be built, was to be of about the length of seventy miles, but that as constructed, it was of the length of but twenty miles, and as constructed, was incapable of irrigating the lands described in your petitioner's application. That the said Farmers Canal Company and Roberts Walker have abandoned the construction of said canal for a period of more than five years; that more than sufficient time has elapsed since the allowance of their said appropriation to have completed said canal, and your petitioner alleges the facts to be that said Farmers Canal Company and Roberts Walker have wholly and entirely abandoned and given up the construction of that portion of the proposed canal necessary to be built, in order to enable them to irrigate the lands included in your petitioner's application; that they have failed and neglected to prosecute the work on such portion of said canal vigorously, diligently and uninterruptedly to completion thereof, whereby the right of said Farmers Canal Company and Roberts Walker to construct and complete its said canal and to the appropriation of water, allowed them to be applied in irrigating the lands described in your petitioner's application, has long since been forfeited and is at this time of no force and effect.

5.

Your petitioner further alleges that the twenty miles of said canal so constructed by the said Farmers Canal Company and Roberts Walker, is not of sufficient size and capacity to permit more water to flow therein than is sufficient to irrigate the land susceptible of irrigation, lying immediately under and along said twenty miles of said canal, and which amounts to no more than five thousand acres, and that none of said land is included in the application of your petitioner.

6.

Your petitioner further alleges that the State Board of Irrigation did not grant to the said Farmers Canal Company and Roberts

Walker until January 1, 1904, to complete said ditch, but that said Board did grant to said parties until January 1, 1904, to apply water to the land described in their application and that the said Board of Irrigation had no power or authority to extend the time provided by Statute in which to construct said canal and which requires that within six months after the approval of the application, work be commenced on the excavation of construction of said canal and continued vigorously, diligently and uninterruptedly to the completion thereof unless temporarily interrupted by some unavoidable or natural cause, and your petitioner alleges that the said Farmers Canal Company and Roberts Walker were not interrupted and prevented from prosecuting said work by any unavoidable or natural causes.

7.

Your petitioner further alleges that William Frank, who files application No. 660 and which said application includes the lands described in your petitioner's application, is a non-resident of any of the Counties through which he proposes to construct his canal; that he is, himself, without means to construct said canal; 484 and your petitioner alleges that he made said application for the purpose of exploiting the territory described therein and for speculation; that since making said application, his efforts have been to sell the same and not to construct the canal as in said application he proposed to do; that the granting to him of an exclusive appropriation to irrigate the land in your petitioner's application described, will be detrimental to the public welfare of the community, comprising your petitioner's district and to the community in general. Your petitioner further alleges that that portion of Section 28, Article 2, Chapter 93a, which prohibits the granting of water for land, when a prior application has been allowed, is null and void, for the reason that said provision is unconstitutional in this, that it confers upon the person or corporation, procuring such appropriation, an irrevocable grant of a special privilege; and is unconstitutional for the further reason that it deprives the owners of land of the right to construct their own canals for the irrigation thereof, thereby depriving them of the use of said land without due process of law.

Therefore your petitioner prays that it may be made a party to this action and permitted to contest the appropriation of the Farmers Canal Company and Roberts Walker, and to protest application No. 660 of William Frank; that upon final hearing that portion of the appropriation of the Farmers Canal Company and Roberts Walker covering the lands in your petitioner's application may be held to have been forfeited by the said parties, and that the same be cancelled; that the application No. 660 of William Frank be disallowed as to the lands in his said application, included in the application of your petitioner, or that if it should be decided that 485 it was not detrimental to public welfare, to allow the application of the said Frank for water for the lands included in your petitioner's application, that your petitioner be also

allowed its application for water for the lands described therein, and that in any event, your petitioner be allowed its application for water as filed herein, and that it be granted such other relief as justice may require.

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WILCOX & HALLIGAN,
Attorneys for Intervenor.

STATE OF NEBRASKA,
Scotts Bluff County:

James Baxter being first duly sworn, deposes and says that the intervenor herein, Farmers Irrigation District, is a corporation; that he is the president thereof; that he has read the foregoing petition of intervention, and that the allegations therein contained are true as he verily believes.

JAMES BAXTER.

Subscribed in my presence and sworn to before me this 11th day of August, 1902.

SAMUEL D. COX,
Notary Public.

That after a hearing on said protests, an order was entered by the State Board of Irrigation denying the application of said William Frank for a permit to appropriate water for the irrigation of any of the lands covered by the eighty miles of the proposed extension of The Farmers Canal; that said proceeding came by appeal to the Supreme Court of the State of Nebraska and on the 9th day of June, 1904, a judgment was entered therein in words and figures as follows:

487 In the Supreme Court of Nebraska, January Term, A. D. 1904, June 9th.

No. 13370.

THE FARMERS IRRIGATION DISTRICT, Plaintiff in Error,

vs.

WILLIAM FRANK, ROBERTS WAKER, and THE FARMERS' CANAL COMPANY, Defendants in Error.

Error to the District Court of Scotts Bluff County.

This cause, coming on to be heard upon proceeding in error, was argued by counsel and submitted to the court; on full consideration thereof, the court doth find error apparent on the record in the proceedings and judgment of the district court, and it is, therefore, considered, adjudged and ordered by the court that said judgment be and the same hereby is reversed and said cause remanded to said district court with directions to enter judgment in favor of The Farmers' Canal Company, and with directions to remand the application of

William Frank in Farmers' Irrigation District to the State Board of Irrigation, with leave to amend, if desired, and for further proceedings, in accordance with a certain opinion, filed this day herein; that the plaintiff in error pay the costs herein incurred by it, taxed at \$—, and have and recover of the defendant in error, William Frank, all of its costs herein expended, taxed at \$—; that the defendant in error, Farmers' Canal Company, pay the costs herein incurred by it, taxed at \$—, and have and recover of the defendant in error, William Frank, all of its costs herein expended, taxed at \$—, and that defendant in error, William Frank, pay the costs herein incurred by him, taxed at \$—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

488 Ninety-and One-half. That at the November 1904 term of the District Court of Scotts Bluff County, Nebraska, said court entered a decree and judgment in said cause on the mandate from the Supreme Court which judgment is in the words and figures following:

"And now on this 18th day of Nov. 1904, it being still of the November, 1904, term of the District Court of Scotts Bluff County, Nebraska, the above entitled causes, having heretofore been consolidated and tried together, both in this Court and on appeal in the Supreme Court, come on again for hearing and for entry of Judgment, in accordance with the mandate of the Supreme Court, heretofore filed in the office of the Clerk of this Court.

The Court, in accordance with the commands of said Mandate does now and here find in favor of the Farmers Canal Company and Roberts Walker, and against the Farmers Irrigation District and against William Frank, in so far as the application of the said William Frank to the State Board of Irrigation for the right to take water from the North Platte River conflicts with the claim of the Farmers Canal Company and Roberts Walker, and does find in favor of the said William Frank and against the Farmers Irrigation District, and the appeals of said William Frank and of the said Farmers Irrigation District, so far as they relate to the Farmers Canal Company are hereby dismissed at the costs of said appellants, and the findings and jurisdiction of the State Board of Irrigation, in so far as it finds the said Roberts Walker as the successor in interest of the Farmers Canal Company entitled to an amount of water from the North Platte River not to exceed eleven hundred forty-two and six-sevenths (1142-6/7) cubic feet per second of time, is hereby ratified and affirmed. And the finding of said State Board of Irrigation relating to the point of diversion of the water from the North Platte River and the

489 priority of the said Farmers Canal Company and Roberts Walker as its assignee and successor in interest, is also affirmed.

It is therefore ordered, adjudged, and decreed by the Court that the said Roberts Walker, assignee and successor in interest of the Farmers Canal Company, has appropriated and is entitled to divert from the North Platte River for irrigation purposes eleven hundred, forty-two and six-sevenths (1142-6/7) cubic feet of water per second of time, and has a vested, subsisting right in and to said appropriation; that the point of diversion is the North bank of the North Platte

River in the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Section three (3), Township Twenty-three (23) of Range fifty-eight (58) West of the 6th P. M., near the west line of Section Ten (10) in said township and range; and that the priority of said appropriation and right to divert said water dates from the 16th day of September, 1887.

It is further considered, ordered and decreed by the Court, in accordance with the mandate of the Supreme Court of the State of Nebraska, that the application of William Frank be and the same is hereby remanded to the State Board of Irrigation with leave to amend his application, if he so desire, without losing his right of priority.

It is further ordered and decreed that the application of the Farmers Irrigation District be and the same is remanded to the State Board of Irrigation with leave to amend said application.

It is ordered and decreed by the Court that the costs in this court on appeal be taxed to the appellants, and that the costs of the Supreme Court, amounting to \$71.15, be taxed to the Farmers Irrigation District and William Frank, in accordance with the mandate of the Supreme Court.

490 Ninety-first. That in January 1904 the Tri-State Land Company was organized as a corporation under and by virtue of the laws of the State of New Jersey, with power and authority to buy, hold and sell real estate and to purchase, construct, erect, establish and maintain dams, irrigating ditches and canals for the purpose of conveying water for irrigating, manufacturing and other useful purposes; and became a domestic corporation of Nebraska in the manner provided by the statutes of Nebraska for a foreign corporation becoming a domestic corporation in said state, and the said Tri-State Land Company is still a domestic corporation of the state of Nebraska; that the capital stock of said Tri-State Land Company consists of 16,000 shares of the par value of \$100 per share.

That on or about the 24 day of February 1904 Heyward G. Leavitt, representing a committee of the Tri-State Land Company, entered into a contract with said Roberts Walker to purchase of and from the said Roberts Walker all the property, rights, privileges, immunities and franchises which had been conveyed to said Roberts Walker under the decree of foreclosure above referred to; by the terms of which agreement the full sum of \$60,000 was to be paid to said Roberts Walker in the event that the determination of the Supreme Court of Nebraska in said Frank case should confirm the adjudication of the State Board of Irrigation, made in 1897, and should hold that said Roberts Walker had all of the rights of said Farmers Canal Company to 1142 $\frac{6}{7}$ cubic feet of water per second of time, with a priority dated from September 16, 1887. And it was a further condition of said contract that said Tri-State Land Company should pay for said property, rights and franchises only the sum of \$21,000 in the event that the Supreme Court of the State of Nebraska should accept and affirm the decision of the district court of the state of Nebraska in the said Frank case, to the effect that said Farmers Canal Company, its successors and assigns, were entitled only to so much water from the Platte River as should be suf-

ficient to irrigate the acreage lying under the portion of the canal of said Farmers Canal Company at that time completed.

That upon the signing of said contract the said Tri-State Land Company paid to said Roberts Walker the sum of \$21,000 and later and upon the rendition by the Supreme Court of the opinion in the Frank case, paid to said Roberts Walker \$39,000 additionally, and thereby completed the payment for the property on behalf of the Company, in accordance with the contract between Roberts Walker and said Company, and received deeds and conveyances of title from Roberts Walker direct to the Tri State Land Company, and also received a quit-claim deed from the Farmers Canal Company to the Tri-State Land Company of said property, and a quit-claim deed from the committee representing all the stockholders and bondholders of the Farmers Canal Company, to the Tri-State Land Company. That said deed from Roberts Walker to the Tri-State Land Company was recorded in Scotts Bluff County, February 21, 1905.

Ninety-second. That in the year 1905 said Tri-State Land Company caused a re-survey to be made of the said Farmers Canal and in the month of August 1905 began the re-construction of the said canal and the enlargement of the same, and to excavate, reconstruct and enlarge that section of the said canal below the nineteen mile portion thereof through which, theretofore, water had been conducted; That the entire capital stock of the Tri-State Land Company, of the face value of One Million Six hundred Thousand Dollars (\$1,600,000.00) has been issued and sold by the Tri-State Land

Company, and is now outstanding, the proceeds of which, 492 together with other large sums borrowed by said Tri-State

Land Company have been expended in the construction, operation and maintenance of said canal, among which items were the following;—during the year 1905 it expended in re-survey, reconstruction and machinery, tools and labor, the sum of One Hundred Thirty-three Thousand Sixty-six and 46/100 Dollars (\$133,066.46); that in August 1906 the said Tri-State Land Company commenced the enlargement of the 19 mile portion of said canal which theretofore had been conducting water, and did during said summer of 1906 and the winter of 1907 continue to prosecute said enlargement, so that in the spring of 1907, said canal was constructed to its full size for a distance of 40 miles below the headgate thereof; and on September 13, 1906, the Tri-State Land Company made an application to the State Board of Irrigation for leave to construct a needle dam across the North Platte River below the head of its said canal, which application was granted by the said State Board, and in the month of October 1906, the said Tri-State Land Company procured the material and entered into a contract for the construction of said dam, under which contract work was commenced in October of said year, and the sum of \$8,000 expended during that year on said dam, and in the enlargement, construction, and work of deepening and widening said canal in the year 1906, the Tri-State Land Company expended for such labor and construction during said year, the sum of \$499,491.87; that in the year 1907, said Tri-State Land Company built a new and substantial headgate of concrete and reinforced steel in addition to its former headgate, and expended in the building

thereof during the said year of 1907, the sum of \$52,113.48; and during said year of 1907, and at a point below its headgate, and within its said canal, began the construction of a waste-gate or spillway to clarify the waters before turning them into its canal: said spillway being of concrete and structural steel, and the same being completed in August 1908; and extended its canal during the said year 1907 in an easterly direction about 20 miles further and excavated the same to its full capacity, and expended in the construction thereof, and in work upon the needle dam and wastegate, in addition to the amount expended in erecting said headgate, the full sum of \$271,273.39, making a total expenditure for construction during the year of 1907 of \$323,386.87; so that said canal at the close of the year of 1907 was completed for a distance of 60 miles from the headgate in an easterly direction and was capable of irrigating 60,000 acres of land.

Ninety-third. That in the year 1908, said The Tri-State Land Company completed its waste-gate or spillway, prosecuted work on its needle dam and extended its canal an additional ten miles, expending during said year in construction, the sum of \$52,410.87; that in the year 1909, said Company extended its canal an additional ten miles to a point within 5 or 6 miles of the terminus of the same as described in the claim filed by The Farmers Canal Company, with the State Board of Irrigation, and expended during said year in the extension of said canal, in work upon the needle dam, and other projects connected with the building of said canal the sum of \$464,535.13; that at the close of said year, said canal was capable of irrigating all of the land described in the opinion of the Secretary of the State Board of Irrigation on the claim of The Farmers Canal Company above referred to: that said needle dam was completed in the month of March 1910; that during the year 1910, said Tri-State Land Company expended on said needle dam, laterals and other construction work the sum of \$198,529.70; that said needle dam cost \$27,869.20; that said headgate cost \$52,113.20; that said waste-gate cost \$42,253.46, and the work on the canals, laterals, bridges, culverts, tools, machinery and labor expended on said canal up to October 31, 1910 in addition to the above amounts expended on the needle dam, headgate and waste-gate was \$1,551,138.44, or a total expenditure for construction up to that date of \$1,673,321.28; that during the years 1908, 1909 and 1910 the Tri-State Land Company constructed a system of laterals leading from its main canal and covering practically all the lands described in the opinion of the Secretary of the State Board of Irrigation; that the amounts above set out do not include the purchase price of said canal, survey, re-surveys, operation, superintendence, interest, attorneys' fees and overhead expenses.

Ninety-fourth. That prior to the commencement of this action, said Tri-State Land Company entered into a contract with the Farmers Mutual Canal Company, a corporation organized and existing under the laws of the State of Nebraska, whereby said Tri-State Land Company agreed to sell and said The Farmers Mutual Canal Company agreed to buy the canal, water rights, appropriations and

franchises of said The Tri-State Land Company; that since the making of said contract, said The Tri-State Land Company conveyed said canal, together with all water rights, appropriations and franchises acquired by it, to said the Farmers Mutual Canal Company, receiving in payment therefor all the shares of stock of the Farmers Mutual Canal Company, amounting in all to 80,000 shares a majority of which said stock said Tri-State Land Company still owns and controls having sold to parties under its canal some 25,000 shares and the legal title of said canal, water rights and franchises is now in the Farmers Mutual Canal Company.

495 Ninety-fifth. That the average flow of the North Platte river during the last half of July and during the months of August, September and October, at or near the head-gate of the canal of the Tri-State Land Company, does not exceed 800 cubic feet of water per second of time, and frequently during said months the discharge of said stream runs as low as 300 cubic feet per second of time; that if no water were diverted from said river at or near the headgate of the canal of the Tri-State Land Company, or below said point, the quantity of water flowing therein would not be materially increased or diminished until it reached a point below the headgate of the lowest canal on said stream involved in this action; that during the months of July, August, September and October of 1910, said Tri-State Land Company and Farmers Mutual Canal Company did divert from said river from 300 to 400 cubic feet of water per second of time, and during portions of said period of time said diversion exhausted all the water flowing in the bed of said river at said point.

That while the Tri-State Land Company and Farmers Mutual Canal Company were diverting all the water flowing in the bed of said river at the head-gate of their said canal, the engineer of said Companies made one measurement of and estimated the amount of water which had come to the surface and was flowing in said river, and found it to be as follows at the following points below said dam: At the head-gate of the Ramshorn Ditch, 79.43 cubic feet per second of time, out of which the Ramshorn Ditch diverted and received 45 cubic feet per second; at the head-gate of the Enterprise Ditch, 59.2, second feet out of which it was then able to and did divert 46.9 cubic feet per second; at the head-gate of the Winters Creek Canal, 80 cubic feet per second of time, out of which it was then able
496 to and did divert 50 cubic feet per second; at a point two miles below the head-gate of said Winters Creek Canal, 117 cubic feet per second of time, all of which, together with other accretions to the river still further below, were needed and used by other ditches mentioned above, so far as the supply permitted, some of said ditches receiving no supply, though needed for irrigation purposes; that the accretions below said dam of the Tri-State Land Company coming to the surface of said stream, vary at different places in said stream and at the same places at different times.

That on or about the 21st day of July 1910, the State Board of Irrigation caused the head-gates of the canals of all of the parties to this action, except the canal of the Tri-State Land Company, to be closed

down for the purpose of causing the water flowing in said river below the dam of the Tri-State canal to flow down to the head-gate of the canal of an alleged prior appropriator, whose canal is located near North Platte, Nebraska; that the closing of some of said head-gates was postponed for a few weeks by temporary injunctions subsequently dissolved, after which they were closed down; that the head-gates of some of said canals were kept closed for several weeks and the head-gates of the others were kept closed during the balance of the irrigation season of 1910; that because of the rendition of the opinion on the claim of the Farmers Canal Company above mentioned and the passage of the resolution of the State Board of Irrigation above mentioned, said Board refused to close the head-gate of the canal of said Tri-State Land Company, and permitted said Tri-State Land Company to continue its diversion as theretofore, and said State Board of Irrigation claims that said Tri-State Land Company has a right, prior to that of any of the other parties to this action, to divert water from said river to the extent of 1142-6/7 cubic feet per second of time, as needed though not in excess of 1/70 cubic foot per second for each acre irrigated under its lines.

497 Ninety-sixth. That unless restrained by a decree of this court, said the Tri-State Land Company and the Farmers Mutual Canal Company will under the direction and permission of the State Board of Irrigation divert into said canal during each and every irrigation season so much of its claimed appropriation of 1142-6/7 cubic feet of water per second of time as said Companies may find necessary, not exceeding 1/70 of 1 cubic foot for each acre irrigated, even though, said diversion consumes all the water flowing in said river and deprives the other parties to this action of the use of any water.

Ninety-seventh. That the lands irrigated under the several canals mentioned to the area or acreage severally herein mentioned during all the years when irrigated as aforesaid, have been used for the raising of diversified crops, including various kinds of grains and cereals, alfalfa, hay, potatoes, vegetables and for the last four years sugar-beets; alfalfa, sugar beets, potatoes and vegetables require irrigation during the months of July, August, and September; that said lands have been brought to a high state of cultivation; that some of said lands have been divided into very small tracts or farms; that said lands are occupied by farmers, holding from 10 to 320 acres of land each; that those occupying small farms have been engaged for some years past in intensive farming, such as the raising of small fruits and vegetables, while some of those on the larger tracts have been raising alfalfa, potatoes and sugar-beets; that trees and shrubbery of various kinds have been planted and are now in a good growing condition on some of said farms; that the crops which require irrigation during the late months of the irrigation season, to-wit: July, August and September, such as alfalfa, potatoes, vegetables of various kinds and sugar-beets, are the most profitable and remunerative. That in case the lands under any of said ditches do not receive water

498 in July, August and September, the owners of such lands will be compelled to cease raising crops, which require irriga-

tion during said months of July, August and September, and will be compelled to raise less remunerative crops which can be irrigated and which require irrigation only in the early part of each irrigation season, or said land holders will be compelled to procure reservoir water at an added expense.

Ninety-eighth. That the map hereto attached, marked exhibit "A" shows the location of the various ditches involved in this action.

(Here follows map marked page 499.)

500

THE ENTERPRISE IRRIGATION DISTRICT,
MITCHELL IRRIGATION DISTRICT,
THE RAMSHORN DITCH COMPANY,
THE GERING IRRIGATION DISTRICT,
THE CENTRAL IRRIGATION DISTRICT,
THE MINATARE MUTUAL CANAL & IRRIGATING COMPANY,
THE STEAMBOAT DITCH COMPANY,
THE NINE MILE IRRIGATION DISTRICT,
THE CHIMNEY ROCK IRRIGATION CANAL
& WATER POWER COMPANY,

By MORROW & MORROW, *Their Attorneys.*

THE WINTERS CREEK IRRIGATION COMPANY,

By H. N. HAYNES, *Its Attorney.*

THE CASTLE ROCK IRRIGATION CANAL
& WATER POWER COMPANY,

By W. W. WHITE AND WM. MORROW,
Its Attorney.

THE ALLIANCE IRRIGATION CANAL &
WATER POWER COMPANY,
THE BELMONT IRRIGATION CANAL &
WATER POWER COMPANY,

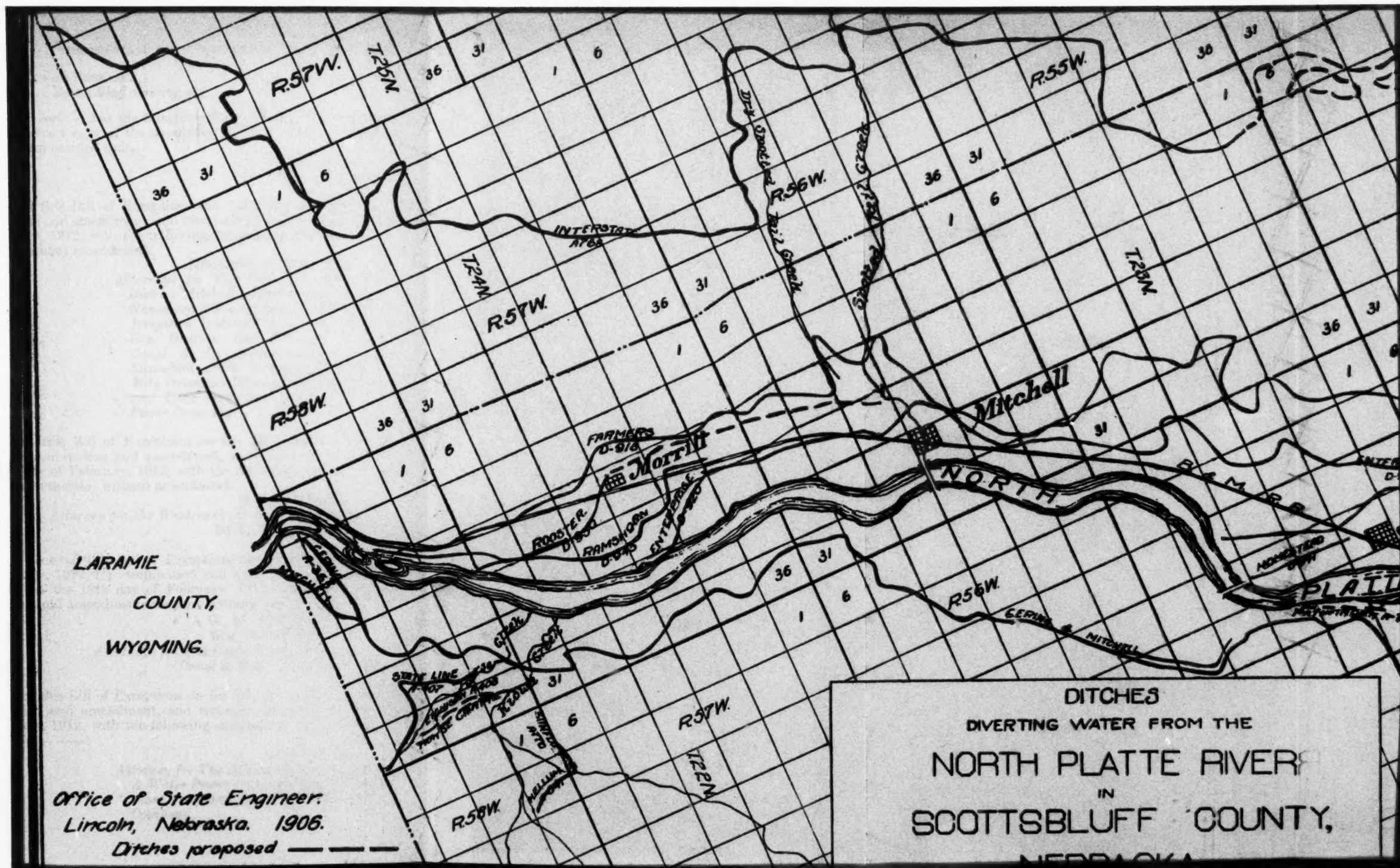
By G. J. HUNT, *Their Attorney.*

THE BROWNS CREEK IRRIGATION COMPANY,

By WILCOX & HALLIGAN, *Its Attorney.*

THE TRI-STATE LAND COMPANY,
FARMERS MUTUAL CANAL COMPANY,

By WRIGHT, DUFFIE & WRIGHT AND
C. C. FLANSBURG, *Their Attorneys.*

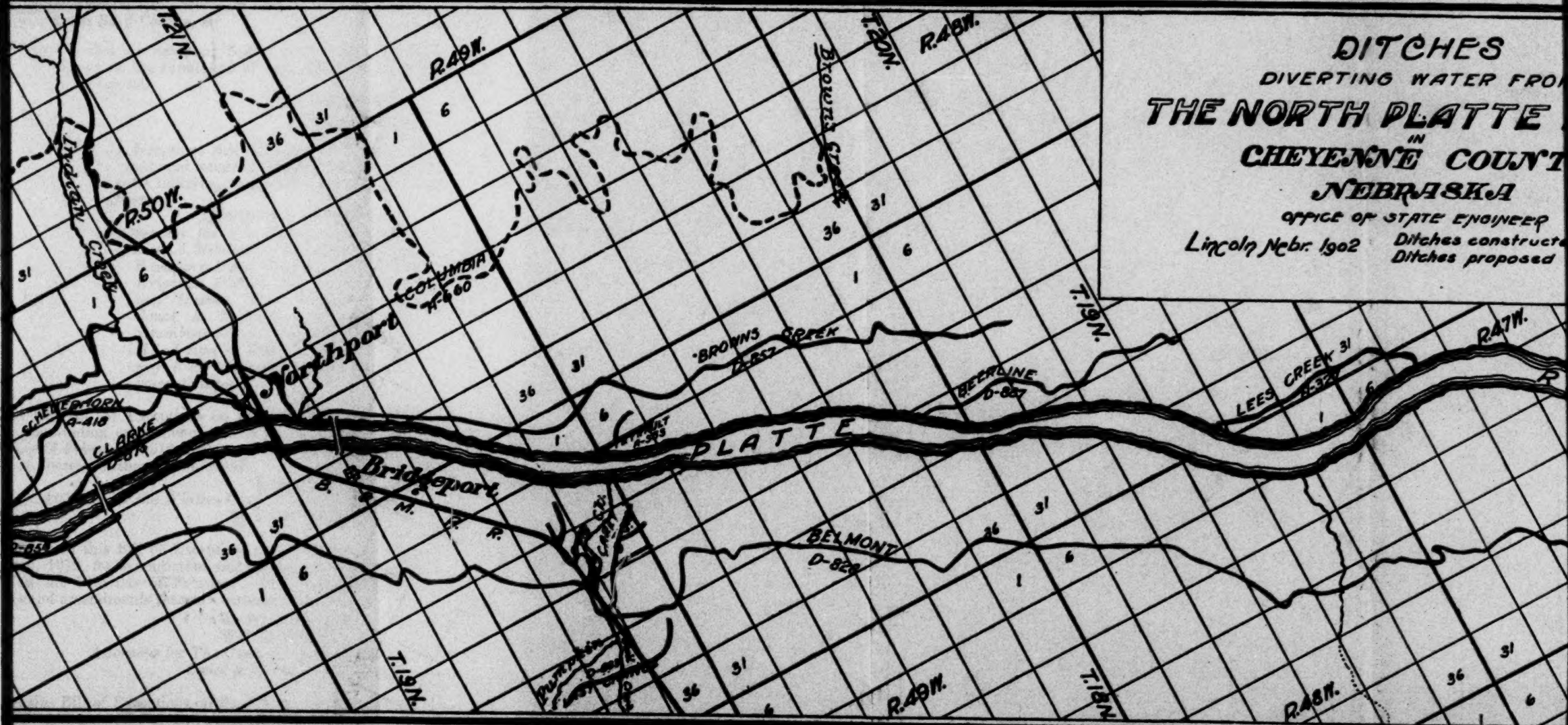


DITCHES
DIVERTING WATER FROM THE
NORTH PLATTE RIVER
IN
SCOTTSBLUFF COUNTY,
NEBRASKA

Office of State Engineer.
Lincoln, Nebraska. 1906.
Ditches proposed — — —

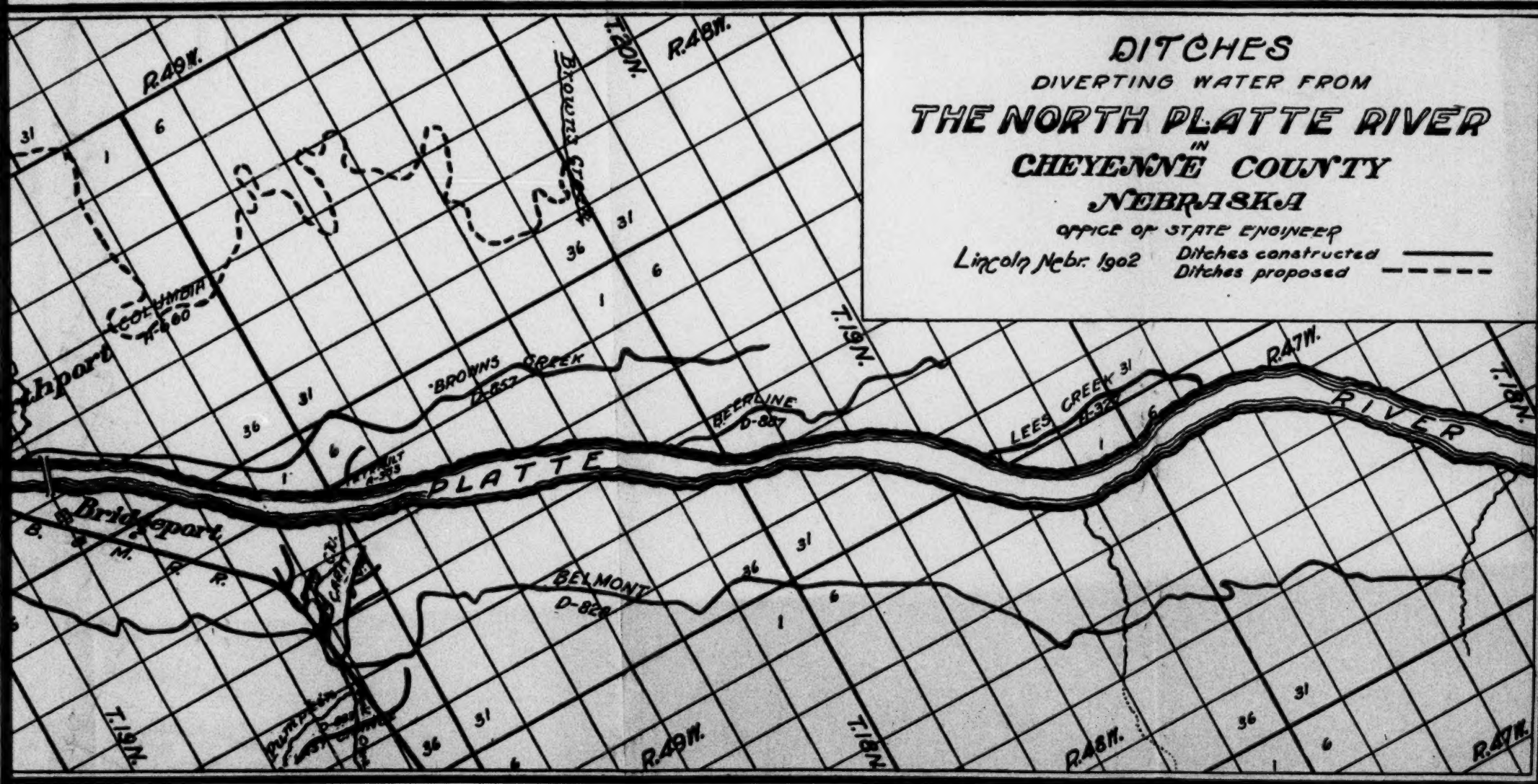
DITCHES
DIVERTING WATER FROM
THE NORTH PLATTE
CHEYENNE COUNTY
NEBRASKA

OFFICE OF STATE ENGINEER
Lincoln, Nebr. 1902
Ditches constructed
Ditches proposed



DITCHES DIVERTING WATER FROM THE NORTH PLATTE RIVER IN CHEYENNE COUNTY NEBRASKA

OFFICE OF STATE ENGINEER
Lincoln, Nebr. 1902
Ditches constructed ———
Ditches proposed - - - - -



#210
Conspicuous Irrigation District
The State Land Co. } \$499.

501 STATE OF NEBRASKA,
Scotts Bluff County, ss:

I hereby certify that the foregoing Bill of Exceptions contains a true and correct copy of the stipulation of facts offered in evidence in the within entitled cause.

P. J. BARRON,
Official Reporter.

Received this Bill of Exceptions this 12th day of February for examination and amendment, and returned the same on the 13th day of February, 1912, with the following suggestions and amendments thereto: without amendment.

MORROW & MORROW,
Attorneys for The Enterprise Irrigation District, Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Minatare Mutual Canal & Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, and The Chimney Rock Irrigation Canal & Water Power Company.

Received this Bill of Exceptions on the 12th day of February, 1912, for examination and amendment, and returned the same on the 13th day of February, 1912, with the following suggestions and amendments thereto: without amendment.

H. N. HAYNES,
Attorney for the Winters Creek Irrigation Company,
By T. M. MORROW.

502 Received this Bill of Exceptions on the 12th day of February, 1912, for examination and amendment, and returned the same on the 13th day of February, 1912, with the following suggestions and amendments thereto: without amendments.

W. W. WHITE &
WM. MORROW,
Attorneys for The Castle Rock Irrigation Canal & Water Power Company.

Received this Bill of Exceptions on the 5th day of Mch. 1912, for examination and amendment, and returned the same on the 5th day of Mch., 1912, with the following suggestions and amendments thereto: ———.

G. J. HUNT,
Attorney for The Alliance Irrigation Canal & Water Power Company, and The Belmont Irrigation Canal & Water Power Company.

Received this Bill of Exceptions on the 7th day of March, 1912, for examination and amendment, and returned the same on the 7th day of March, 1912, with the following suggestions without amendments thereto: — — —.

WILCOX & HALLIGAN,
By WM. MORROW,
*Attorneys for The Browns Creek
Irrigation Company.*

503 I hereby certify that the foregoing Bill of Exceptions contains all the testimony introduced or offered by the plaintiff and defendants on the trial of the within named cause, together with all the objections interposed, the grounds therefor, the rulings thereon, and the exceptions taken thereto. And I hereby approve, signed and settled the same as the Bill of Exceptions of said cause in said court.

R. W. HOBART,
*Judge of the Seventeenth Judicial
District of Nebraska.*

Gering, Nebraska, March 7th, 1912.

Endorsed: 17522. The Enterprise Irrigation District v. Tri-State Land Co. Bill of Exceptions. Supreme Court of Nebraska. Filed Mar. 12 1912. H. C. Lindsay, Clerk.

504 And on the same day there was filed in the office of the clerk of said supreme court a certain Præcipe, in the words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

ENTERPRISE IRRIGATION DISTRICT, Appellee,
v.
THE TRI-STATE LAND COMPANY and THE FARMERS MUTUAL IRRIGATION Co., Appellants,
and
THE MINATARE CANAL Co. et al., Appellees.

Præcipe.

To the Clerk of said Court:

Please docket the enclosed transcript of record as an appeal from a judgment rendered on the 22 day of January 1912, in a certain cause in the District Court of Scotts Bluff County, wherein Enterprise Irrigation District was Plaintiff, and The Tri-State Land Company et al. Defendants.

You will designate the above named The Tri-State Land Company and The Farmers Mutual Irrigation Company as Appel-ants

and Enterprise Irrigation District, Minatare Canal Company et al., as Appellees.

No notice of appeal for above named Appellees is necessary.

C. C. FLANSBURG AND
WRIGHT & DUFFIE,
Attorneys for Appellants.

Endorsed: General No. 17522. Supreme Court, State of Nebraska. Enterprise Irrigation District v. Tri-State Land Co. Præcipe. Supreme Court of Nebraska. Filed Mar. 12 1912. H. C. Lindsay, Clerk.

505 And on the same day there was filed in the office of the Clerk of said Supreme Court certain Motions to Advance with Notice and Proof of Service, in words and figures following, to-wit:

In the Supreme Court of the State of Nebraska.

ENTERPRISE IRRIGATION DISTRICT, Plaintiff and Appellee,
vs.

TRI-STATE LAND COMPANY and FARMERS' MUTUAL IRRIGATION DISTRICT, Defendants and Appellants.

Notice of Motion to Advance.

To the Appellees and Their Attorneys:

You and each of you are hereby notified that on Friday March 8, 1912, at the hour of Nine o'clock A. M., or as soon thereafter as counsel can be heard, at the Supreme Court room in the State-house at Lincoln, Nebraska, appellants will move the court to advance the above entitled cause for the reasons set forth and recited in the annexed Motion.

WRIGHT & DUFFIE AND
C. C. FLANSBURG,
Attorneys for Appellants.

Service of this Notice acknowledge- this 5th day of March 1912.
MORROW & MORROW,

Attorneys for The Mitchell Irrigation District, The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Minatare Mutual Canal & Irrigation Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Chimney Rock Irrigation Canal & Water Power Company.

506

In the Supreme Court of the State of Nebraska.

ENTERPRISE IRRIGATION DISTRICT, Plaintiff and Appellee,
vs.TRI-STATE LAND COMPANY and FARMERS' MUTUAL IRRIGATION
DISTRICT, Defendants and Appellants.*Motion to Advance.*

Appellants move the Court to advance the above entitled cause to a speedy hearing, for the following reasons, to-wit:

1. The case is of great public importance in as much as the decree of the court below declares invalid adjudications made by the State Board of Irrigation, and holds the same to be void, which in effect declared that all adjudications of the State Board of Irrigation are null and void.

2. The Court by its decree has usurped the functions and powers of the State Board of Irrigation, has ignored the adjudications made by the State Board, and has independently and in disregard thereof fixed and determined the rights and priorities of the parties hereto, being some fifteen appropriators of the waters of the North Platte River.

3. The adjudications determined by this decree, while null and void, are yet binding until reversed by this court; and said decree renders it impossible for the State Board of Irrigation to administer the waters without being either in conflict with said decree or in conflict with its former adjudications.

4. By statute appeals from the order of the State Board fixing and determining priorities, is given a right of way in both the District and Supreme Courts; and the effect of this decree being to adjudicate and determine conflicting rights, falls within the spirit of that Act and should be advanced.

5. The development of all the land in the North Platte Valley, subject to irrigation, is retarded, and will be until the rights
507 of the water users in this cause are disposed of in this proceeding.

WRIGHT & DUFFIE AND
C. C. FLANSBURG,
Attorneys for Appellants.

Endorsed: 17522. The Enterprise Irrigation District v. Tri-State Land Co. Motion to Advance Notice & Proof of Service. Supreme Court of Nebraska. Filed Mar. 12, 1912. H. C. Lindsay, Clerk.

STATE OF MINNESOTA,
Supreme Court:

ENTERPRISE IRRIGATION DISTRICT, Plaintiff and Appellee,
 v.
 TRI-STATE LAND COMPANY and THE FARMERS MUTUAL CANAL CO.,
 Defendants and Appellants.

Notice of Motion to Advance.

To the Winters Creek Irrigation Company and its attorney of record.

You and each of you are hereby notified that on Friday, March 8, 1912, at the hour of 9 A. M. or as soon thereafter as counsel can be heard, a motion to advance the above entitled cause will be presented to said court in the court room in the state house in Lincoln Nebraska, a copy of which is hereto attached.

TRI-STATE LAND COMPANY AND
 FARMERS MUTUAL CANAL CO.,
 By WRIGHT & DUFFIE AND
 C. C. FLANSBURG,
Their Attorneys.

Received a copy of the within notice and motion *motion* and service thereof is hereby acknowledged this 4th day of March
 508 1912, at Greeley, Weld County, Colorado.

H. N. HAYNES,
Attorney for Winters Creek Irrigation Company.

STATE OF NEBRASKA,
Supreme Court:

ENTERPRISE IRRIGATION DISTRICT, Plaintiff and Appellant,
 v.
 TRI-STATE LAND COMPANY et al., Defendant and Appellees.

Motion to Advance.

The Tri-State Land Company and the Farmers Mutual Canal Company move the court to advance the above entitled cause to a speedy hearing for the following reasons, to-wit:—

1. The decree entered in this case holds the adjudication of water rights by the state board of irrigation, void and of no effect, and proceeds to adjudicate the rights of the water users of the North Platte River, independently of the former adjudication of the state board of irrigation and utterly disregards and sets aside the same.

2. That by the irrigation act of 1895 the state board has original and exclusive original, jurisdiction to determine existing rights, pursuant to which the rights of all parties hereto were determined by said board in 1897, all of which is, by the decree entered herein nullified and rendered nugatory.

3. That said decree is inconsistent, is pronounced by a tribunal without jurisdiction, and renders the administration of the public waters of the state, by the state board of irrigation impossible and ineffective and takes away the administrative powers of said board.

4. That the question in this case is one of great public importance affecting as it does every water right adjudicated by the state board of irrigation and rendering doubtful the validity of 411 the
509 adjudications of said board and each of them.

WRIGHT & DUFFIE AND
C. C. FLANSBURG,
Attorneys for Appellants.

Endorsed: 17522. The Enterprise Irrigation District v. Tri-State Land Company. Motion to Advance. Notice and Proof of Service. Supreme Court of Nebraska. Filed Mar. 12, 1912. H. C. Lindsay, Clerk.

STATE OF NEBRASKA,
Supreme Court:

ENTERPRISE IRRIGATION DISTRICT, Plaintiff and Appellee,
v.
TRI-STATE LAND Co. et al., Defendants and Appellants.

Notice of Motion.

To the Enterprise Irrigation District; Mitchell Irrigation District; Ramshorn Ditch Co.; Gering Irrigation District; Winters Creek Irrigation Company; Central Irrigation District; Castle Rock Irrigation Canal and Water Power Co.; Minatare Mutual Canal; Steamboat Ditch Co.; Nine Mile Irrigation District; Alliance Irrigating Canal; Chimney Rock Irrigation Canal; Browns Creek Irrigation Company; Charles E. Logan; Belmont Irrigation Canal; Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a copartnership, appellees, and Morrow & Morrow, H. S. Haynes, G. J. Hunt, Wilcox & Halligan and W. W. White, their attorneys of record:

You and each of you are hereby notified that on Friday March 8, 1912, at the hour of 9 A. M. or as soon thereafter as counsel can be heard, a motion to advance the above entitled cause will be presented to said court at the court room in the state house in Lincoln, Nebraska, a copy of which is hereto annexed:

510

TRI-STATE LAND COMPANY AND
FARMERS MUTUAL CANAL COMPANY,
By WRIGHT & DUFFIE AND
C. C. FLANSBURG,
Their Attorneys.

Service of the within notice and motion accepted this 7th, 1912.

CASTLE ROCK IRRIGATION AND WATER
POWER CO.,

By W. W. WHITE AND
WM. MORROW,

Its Att'ys.

ENTERPRISE IRRIGATION DISTRICT,
MITCHELL IRRIGATION DISTRICT,
RAMSHORN DITCH CO.,
GERING IRRIGATION DISTRICT,
CENTRAL IRRIGATION DISTRICT,
CASTLE ROCK IRRIGATION CANAL AND
WATER POWER COMPANY,
MINATARE MUTUAL CANAL CO.,
STEAMBOAT DITCH COMPANY,
NINE MILE IRRIGATION DISTRICT,
CHIMNEY ROCK IRRIGATION CANAL
AND WATER POWER COMPANY,

By MORROW & MORROW,

Their Attorneys.

BROWNS CREEK IRRIGATION CO.,

By HALLIGAN & WILCOX, *Their Attorneys.*

WINTERS CREEK IRRIGATION COMPANY,

By N. H. HAYNES, *Its Att'y,*

By WM. MORROW.

State of Nebraska Supreme Court.

ENTERPRISE IRRIGATION DISTRICT, Plaintiff and Appellee,

vs.

TRI-STATE LAND COMPANY et al., Defendants and Appellants.

Notice to Advance.

The Tri-State Land Company and The Farmers Mutual Canal Company move the court to advance the above entitled cause to a speedy hearing for the following reasons to-wit:—

1. The decree entered in this case holds the adjudication of water rights by the state board of irrigation void and of no effect, and proceeds to adjudicate the rights of the water users of the North Platte River independently of the former and valid adjudication of the state board of irrigation and utterly disregards the same.

511 2. That by the irrigation act of 1895 the state board has original, and exclusive original, jurisdiction to determine existing rights, pursuant to which the rights of all the parties hereto were determined by said board in 1897, all of which is, by the decree entered herein nullified and rendered nugatory.

3. That said decree is inconsistent, is pronounced by a tribunal without jurisdiction, and renders the administration of the public waters of the state by the state board of irrigation impossible and ineffective and takes away the administrative powers of said board.

4. That the question in this case is one of great public interest affecting as it does every water right adjudicated by the state board of irrigation and rendering doubtful the validity of the adjudication of said board and each and all of them.

WRIGHT & DUFFIE AND
C. C. FLANSBURG,

Attorneys for Appellants.

Endorsed: 17522. The Enterprise Irrigation District v. Tri-State Land Company. Motion to Advance. Notice & Proof of Service. Supreme Court of Nebraska. Filed Mar. 12, 1912. H. C. Lindsay, Clerk.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain Stipulation in the words and figures following, to-wit:

512 In the District Court of Scotts Bluff County, Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff,
vs.

TRI-STATE LAND COMPANY, FARMERS MUTUAL CANAL COMPANY, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minutaire Mutual Canal & Irrigating Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal & Water Power Company, The Browns Creek Irrigation Company, The Chimney Rock Irrigation Canal & Water Power Company, Charles E. Logan, The Belmont Irrigation Canal and Water Power Company, Thomas A. Wheeler, Charles A. Street, William E. Guthrie, a Copartnership under the Firm Name of The Lucerne Land Company.

Stipulation.

It is hereby stipulated by and between the Belmont Irrigating Canal and Water Power Company and the Alliance Irrigating Canal and Water Power Company defendants above named, and the Tri-State Land Company and the Farmers Mutual Canal Company appellants herein, that when this appeal is lodged in the Supreme Court that the hearing thereof may be advanced to such date as the Court may see fit to designate.

BELMONT IRRIGATING CANAL AND
WATER POWER COMPANY,
THE ALLIANCE IRRIGATING CANAL
AND WATER POWER COMPANY,

By G. J. HUNT, *Their Attorney.*

TRI-STATE LAND COMPANY,
FARMERS MUTUAL CANAL COMPANY,

By WRIGHT & DUFFIE,
Their Attorneys.

Endorsed: 17522. Enterprise Irrigation District v. Tri-State Land Company Stipulation to Advance Supreme Court of Nebraska Filed Mar. 12 1912 H. C. Lindsay, Clerk.

513 And on the same day there was rendered by said supreme court and entered of record upon the journal thereof, a certain order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1912, March 12.

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee.

v.

TRI-STATE LAND COMPANY et al., Appellants, Impleaded with THE MITCHELL IRRIGATION DISTRICT et al., Appellees.

Appeal from the District Court of Scotts Bluff County.

This cause coming on to be heard upon motions of appellants and stipulation of parties to advance, was submitted to the court, upon due consideration whereof, it is by the court ordered that said motions and stipulation be, and the same hereby are allowed and cause advanced and set for hearing at the session of court commencing May 6, 1912; that appellants serve and file abstracts and briefs herein by March 23, 1912, and that appellees serve and file answer briefs within thirty days thereafter.

J. FAWCETT,
Acting Chief Justice.

And afterwards, to-wit, on the 11th day of April, 1912, there was filed in the office of the clerk of said Supreme Court a certain Præcipe, in the words and figures following, to-wit:

514

In the Supreme Court of Nebraska.

THE ENTERPRISE IRRIGATION DISTRICT, Plaintiff and Appellee,
VS.

TRI-STATE LAND COMPANY, FARMERS MUTUAL CANAL COMPANY,
and The Mitchell Irrigation District, Defendants and Appellants;
The Ramshorn Ditch Company, The Gering Irrigation District
The Winters Creek Irrigation Company, Central Irrigation Dis-
trict, The Castle Rock Irrigation Canal & Water Power Company
The Minatare Mutual Canal & Irrigating Company, The Steam-
boat Ditch Company, The Nine Mile Irrigation District, The
Alliance Irrigating Canal & Water Power Company, The Chimney
Rock Irrigation Canal & Water Power Company, Browns Creek
Irrigation Company, Charles E. Logan, The Steamboat Irriga-
tion Canal & Water Power Company, and Thomas W. Wheeler
Charles A. Sweet, William E. Guthrie, a Copartnership under
the Firm Name of The Lucerne Land Company, Defendants and
Appellees.

Præcipe.

Whereas, on the 22nd day of January, 1912, the district court of
Scotts Bluff County, Nebraska, entered a decree in the above en-
titled cause of action wherein the Enterprise Irrigation District was
plaintiff and Tri-State Land Company, The Farmers Mutual Canal
Company, The Mitchell Irrigation District, The Ramshorn Ditch
Company, The Gering Irrigating District, The Winters Creek Irriga-
tion Company, The Central Irrigation District, The Castle Rock
Irrigation Canal & Water Power Company, The Minatare Mutual
Canal & Irrigating Company, The Steamboat Ditch Company, The
Nine Mile Irrigation District, The Alliance Irrigation Canal &
Water Power Company, The Chimney Rock Irrigation Canal &
Water Power Company, The Browns Creek Irrigation Company,
Charles E. Logan, The Belmont Irrigation Canal & Water Power
Company and Thomas W. Wheeler, Charles A. Sweet, William E.
Guthrie, a Co-partnership under the firm name of The Lucerne
Land Company, were defendants, and

515 Whereas, The Mitchell Irrigation District appeals to this
court from the judgement and decree entered by the district
court of Scotts Bluff County, Nebraska.

Now, therefore, please docket said cause of action designating Tri-
State Land Company and Farmers Mutual Canal Company and
Mitchell Irrigation District as appellants and The Enterprise Irriga-
tion District, The Ramshorn Ditch Company, The Gering Irriga-
tion District, The Winters Creek Irrigation Company, The Central
Irrigation District, The Castle Rock Irrigation Canal & Water Power
Company, The Minatare Mutual Canal & Irrigating Company, the
Steamboat Ditch Company, The Nine Mile Irrigation District, The
Alliance Irrigating Canal & Water Power Company, The Chimney
Rock Irrigation Canal & Water Power Company, the Browns Creek
Irrigation Company, Charles E. Logan, the Belmont Irrigation

Canal & Water Power Company and Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a Co-Partnership under the Firm Name of The Lucerne Land Company, as appellees, and please issue notice of appeal by the Mitchell Irrigation District for service upon the various parties hereto.

THE MITCHELL IRRIGATION DISTRICT,
By MORROW & MORROW, *Its Attorneys.*

Endorsed: 17522. The Enterprise Irrigation District v. Tri-State Land Co. Præcipe for Notice of Cross Appeal Supreme Court of Nebraska Filed April 11 1912 H. C. Lindsay Clerk.

And on the same day there was made to issue out of the office of the clerk of said supreme court a certain Notice of Cross Appeal, in the words and figures following, to-wit:

516 *Notice of Cross Appeal.*

THE STATE OF NEBRASKA, ss:

To the Sheriff of the County of Scotts Bluff:

You are hereby commanded to notify The Enterprise Irrigation District, Tri-State Land Company, The Farmers Mutual Canal Company, Ramshorn Ditch Company, The Gering Irrigation District, The Winters Creek Irrigation Company, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, Minatare Mutual Canal and Irrigating Company, Steamboat Ditch Company, The Nine Mile Irrigation District, Alliance Irrigating Canal & Water Power Company, Chimney Rock Irrigation Canal & Water Power Company, The Browns Creek Irrigation Company, Charles E. Logan, The Belmont Irrigation Canal & Water Power Company, Thomas W. Wheeler, Charles A. Sweet, William E. Guthrie, a co-partnership under the firm name of The Lucerne Land Company.

That a Cross Appeal has been taken to the Supreme Court of the State of Nebraska by The Mitchell Irrigation District asking the reversal of a judgment against it rendered on the 22 day of January A. D. 1912 in a certain cause in the District Court of Scotts Bluff County, wherein The Enterprise Irrigation District was Plaintiff, and Tri-State Land Company et al. were Defendants.

You will make due return of this notice, on or before thirty days after the date hereof.

Witness my hand and Seal of said Court, at the City of Lincoln, this 11 day of April 1912.

[SEAL.]

H. C. LINDSAY, *Clerk.*

Endorsed: General No. 17522 Supreme Court State of Nebraska The Enterprise Irrigation District v. Tri-State Land Company Notice of Cross Appeal.

517 And afterwards, to-wit: on the 7th day of May 1912 said Notice of Cross Appeal theretofore issued out of the office of the clerk of said supreme court was returned and filed in the office of said clerk with service thereof acknowledged, in the words and figures following, to-wit:

Service of the within Notice of Appeal acknowledged this 13th day of April 1912.

TRI-STATE LAND COMPANY AND
FARMERS MUTUAL CANAL COMPANY,
Appellees,

By C. C. FLANSBURG &
WRIGHT & DUFFIE,
Their Attorneys.

BELMONT IRRIGATING CANAL & WATER
POWER COMPANY AND
THE ALLIANCE IRRIGATING CANAL AND
WATER POWER COMPANY,

By G. J. HUNT, *Their Attorney.*
WINTERS CREEK IRRIGATION COMPANY,
By H. N. HAYNES, *Its Attorney.*

BROWNS CREEK IRRIGATION COMPANY,
By WILCOX & HALLIGAN, *Its Attorney.*
CASTLE ROCK IRRIGATION CANAL &
WATER POWER COMPANY,

By W. W. WHITE & WM. MORROW,
Its Attorneys.

ENTERPRISE IRRIGATION DISTRICT.
STEAMBOAT DITCH COMPANY.
RAMSHORN DITCH COMPANY.
GERING IRRIGATION DISTRICT.
CHIMNEY ROCK IRRIGATION CANAL &
WATER POWER COMPANY.
NINE MILE IRRIGATION DISTRICT.
MINATARE MUTUAL CANAL & IRRIGA-
TION CO.

CENTRAL IRRIGATION DISTRICT,
By MORROW & MORROW.

Endorsement: Supreme Court of Nebraska Filed May 7 1912
H. C. Lindsay Clerk.

518 And afterwards, to-wit: on the 10th day of May, 1912 there was rendered by said supreme court and entered of record upon the journal thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1912, May 10.

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee and Cross-Appellee,
v.
TRI-STATE LAND COMPANY et al., Appellants, Impleaded with
The Mitchell Irrigation Co., Appellee and Cross-Appellant;
Ramshorn Ditch Co. et al., Appellees and Cross-Appellees.

Appeal from the District Court of Scotts Bluff County.

On motion of J. J. Halligan of North Platte, it is by the court ordered that Harry N. Haynes of the Colorado bar be, and he hereby is, admitted to practice in this court for the purpose of this cause herein.

M. B. REESE,
Chief Justice.

And on the same day the following among other proceedings were had and done in said supreme court, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1912, May 10.

The following cause was argued by counsel and submitted to the court:

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT
v.
TRI-STATE LAND CO.

Appeal from Scotts Bluff County.

M. B. Reese, Chief Justice.

519 And on the same day there was rendered by said supreme court and entered of record upon the record thereof, a certain Order in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1912, May 10.

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee and Cross-Appellee,
v.
TRI-STATE LAND COMPANY et al., Appellants, Impleaded with
The Mitchell Irrigation Co., Appellee and Cross-Appellant;
Ramshorn Ditch Co. et al., Appellees & Cross Appellees.

Appeal from the District Court of Scotts Bluff County.

Upon request, leave is hereby given E. C. Calkins to file briefs herein, Amicus Curias.

M. B. REESE,
Chief Justice.

And afterwards, to-wit: on the 18th day of October 1912, there was rendered by said court and entered of record upon the journal thereof a certain Judgment, in the words and figures following, to-wit:

Supreme Court of Nebraska, September Term, A. D. 1912, Oct. 18.

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee,
v.
TRI-STATE LAND Co. et al., Appellants, Impleaded with THE
MITCHELL IRRIGATION DISTRICT et al., Appellees.

Appeal from the District Court of Scotts Bluff County.

520 This cause coming to be heard upon appeal from the district court of Scotts Bluff County, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed, and the cause dismissed, but without prejudice as to any controversy between the plaintiff and cross-petitioners; that appellants pay all costs incurred herein by them, taxed at \$—, and have and recover from appellees all their costs so expended; that appellees pay all costs incurred herein by them, taxed at \$—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

M. B. REESE,
Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Opinion by said court, pursuant to which the preceding judgement was entered, which opinion is in the words and figures following, to-wit:

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No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT

v.

TRI-STATE LAND CO.

Opinion. Filed Oct. 18, 1912.

1. Before the 1911 amendment to section 17, ch. 69, laws 1895, and under the Irrigation Act of 1889, ch. 68, laws 1889, one who has constructed a canal for the purpose of carrying water for hire to be used upon the lands of others, and is ready and willing to furnish the water to such land owners as will take it, has made the only application of water to a beneficial use that he can make, and his right to an appropriation continues as a developing right until all lands along the canal for which the water was originally appropriated use the same; provides—formerly—that the water be applied to the land within a reasonable time, and—now—within the time limited by statute.

2. The constitutionality of the Irrigation Act of 1895 and the provisions thereof creating the State Board of Irrigation and conferring on the board the right to determine priorities, reaffirmed; following *Crawford Co. v. Hathaway*, 60 Neb. 754, 61 Neb. 317, 67 Neb. 325; *McCook Irrigation & Water Power Co. v. Crews*, 70 Neb. 115.

3. Where a statute authorizes a proceeding under the police powers of the state affecting property rights and does not expressly provide for notice to be given to the property owner, the right to notice is implied and where a proper notice has been given, under a
522 procedure authorized by the legislature, and the party interested has appeared, he has not been deprived of any of his rights without due process of law.

4. The legislature has power to delegate the duty of formulating rules of procedure before the state board of irrigation and the fact that the method of procedure is not embodied in the statute does not render due process lacking in the proceedings of the board.

5. In determining priorities of appropriation under the act of 1895 the transcript of posted and recorded notices transmitted by the county clerk to the state board of irrigation constitute the "claims" for adjudication.

6. The limitation of 30 days within which to issue a certificate by the board of irrigation, under section 21 of the 1895 act, is merely directory. Such certificate does not constitute the adjudication but is merely evidence thereof.

7. In determining priorities under sections 15-27, of the act of 1895, the board of irrigation although it might recognize and de-

termine existing conditions and limitations, was without power to impose new.

523 8. Under the facts set forth in the opinion, held: that the right of the Tri-State Land Company to an appropriation, as successor in interest of the Farmers Canal Company and Roberts Walker, was not lost by lack of diligence, non-user or abandonment.

9. The posting and recording of notices of "claims" to the waters of the state, under the laws of 1889, ch. 68, held to be a public record of which all parties interested were bound to take notice, and with knowledge of which they were chargeable.

10. After it had been adjudged that Roberts Walker had a valid appropriation to 1142-6/7 cubic feet of water per second of time from the North Platte river, with priority dating from September 16, 1887, the Tri-State Land Company purchased all his rights in the appropriation and canal. It immediately began the expenditure of large sums of money in the enlargement and completion of the canal and carried the same forward with diligence from year to year until it had expended nearly \$2,000,000. In 1906 it applied to and received leave from the state board of irrigation to construct a needle dam in the river for the purpose of conducting water into its head-gate and thereafter erected the same at large expense. There being insufficient water in the river during the months of July, August

and September to supply the amount claimed by the Tri-State
524 Land Company and also to supply the amount to which the plaintiffs are entitled, plaintiffs began this action in 1909 for the purpose of adjudicating priorities of the respective water users in the river, and procuring a decree that their rights are superior to those of the Tri-State Land Company except as to about 28 second feet, and for an injunction to restrain the use or diversion of more than that quantity of water by the defendants. Held, that since the plaintiffs stood by for more than four years with full notice and knowledge of the "claims" of the defendants to an appropriation of 1142-6/7 second feet and permitted defendants to expend nearly \$2,000,000 without objection or without notice of their claims to a prior appropriation, and without beginning an action to restrain the diversion of the water in excess of the amount which they concede defendants are entitled to, they are estopped, after the substantial completion of the canal and works, to maintain this action.

525 LETTON, J.:

This action was begun on August 23, 1909 by the Enterprise Irrigation District claiming an appropriation of water from the North Platte river, claim made by the Enterprise Ditch Company in March, 1899, to whose rights the plaintiff has succeeded by purchase. A large number of other persons and corporations claiming appropriations of water from the North Platte river in Scotts Bluff and Cheyenne counties are made parties defendant. When the issues were finally made up it appeared that plaintiff and each of the defendants except the Tri-State Land Company and the Farmers Mutual Canal Company were interested in having the prayer of the petition

granted and that practically the same relief is sought by each of them against two defendants named. There is one exception to this general statement which will be hereafter noted. Throughout the opinion, therefore, for convenience the two latter named companies will be designated as defendants and all the other parties as plaintiffs. The State Board of Irrigation and the Secretary of the State Board will be hereafter termed the State Board or the Secretary, as the case may be.

The pleadings are exceedingly lengthy and involved, therefore, no attempt will be made to set them out in detail. The cause was tried upon the pleadings and upon an agreed stipulation of facts so that the questions presented are practically questions of law.

The dispute may be summarized thus: The defendants claim an appropriation of water to the extent of 1,142-6/7 cubic feet prior in point of time to an appropriation by any of the plaintiffs and an adjudication in their favor by the State Board of Irrigation to this extent. The plaintiffs' claim is that an appropriation to the extent of more than 28 feet never actually vested in the Farmers Canal Company or its successors, and that by the actual beneficial use of water by the plaintiffs before the water had been put to beneficial use by the defendants, and before the canals of defendant had been constructed, plaintiffs acquired a prior right to all but 28 second feet of the water claimed by defendants. They further contend that if the Farmers Canal Company ever acquired an appropriation for the full amount it had lost the same by non-user. The defendants assert the validity of their appropriation, that it is prior in point of time to that of any of the plaintiffs, and deny its loss by non-user or abandonment. They also plead an estoppel by reason of plaintiffs standing by with knowledge of their claims for years and allowing them to expend vast sums of money in the carrying out of their enterprise without notice of any hostile or adverse claim of superior right until after the works were practically completed. At the close of the trial the court found for each and all of the plaintiffs and cross-petitioners except the Mitchell Irrigation District and rendered a decree which ascertained and adjudged the respective appropriations to which the parties were entitled and established their respective priorities, without reference to the action of the state board in 1896 and 1897. The Tri-State Company and the Farmers
527 Mutual Canal Company were adjudged to have an appropriation of 28.57 cubic feet per second only, instead of 1,142-6/7 second feet as claimed, with priority dating from September 16, 1887. As to any excess over this amount if an appropriation was ever acquired it had become lost by failure to apply the same to a beneficial use for a continuous period of more than 10 years. As to the Mitchell Irrigation District the court found that because its canal heads in the state of Wyoming and the water is diverted into it in that state the court had no jurisdiction of the subject matter of its cross-petition and the same was dismissed.

Much abbreviated, but preserving those facts we consider material to the controversy, the stipulation of facts upon which the case was submitted shows that the lands are in the valley of the North Platte

river and that the amount of water flowing in the bed varies greatly at different times in the year. During April, May and June the amount of water usually flowing has been sufficient to supply all irrigation to the canals thus far constructed. There are no tributaries between the headgate of defendants' canal and the headgate of the canals of any of the plaintiffs. If no water were diverted at defendants' headgate the quantity of water flowing would not be materially increased or diminished when it reached the headgate of the lowest canal, belonging to a party to this suit.

On the 16th of September, 1887, the Farmers Canal Company, a corporation, posted a notice at the proposed point of diversion of its intention to divert from the North Platte river for the purpose of irrigation a quantity of water sufficient to fill a canal 40 feet wide on the bottom and carry water to a depth of four feet and on the same day notice was duly filed and recorded in the office of the county clerk of Cheyenne county, which at that time included the territory now embraced in Scotts Bluff county. In March, 1888, the Farmers Canal Company commenced the construction of the canal and continued work on it until about the year 1890 at which time it was constructed a distance of about 10 miles. The ditch was then about 12 feet wide on the bottom just below the headgate. The first mile was about six feet deep and was capable of carrying water to a depth of two feet. There was not more than 1,500 acres susceptible of irrigation from the canal as then constructed and the capacity of the canal was not sufficient to carry water for more than 1,000 to 1,200 acres of land. On November 17, 1890 this company posted at the headgate and filed for record in the office of the county clerk of Scotts Bluff county a notice of its intention to divert water in addition to its former claim to the amount of 200,000 miners' or statutory inches. The notice also specified that the canal shall be 80 feet wide on the bottom with a slope of one to one and a depth of 8.84 feet at the point of the diversion with an average grade of not more than two feet per mile. In 1891 the canal company issued bonds secured by mortgage upon all its property and sold about \$80,000 worth. In the spring of 1892 it resumed work on the canal with the proceeds of the sale, constructed a substantial headgate costing about \$8,000 and excavated the canal to a width of about 100 feet to a point 500 feet below the headgate and from there to a point about 4,000 feet below to a width of 60 feet on the bottom, and from there to a point about 19 miles below to a width of 30 feet on the bottom, and water was conducted from the river therein. The canal as constructed was capable of carrying water to a depth of six feet and was of sufficient capacity to irrigate 30,000 acres of land. Twenty-five miles of the canal from a point below the 19 miles mentioned had been opened up at various places to the full width and nearly one quarter of the work thereon had been performed in detached sections but had not been connected up with the 19 miles above. All this work was accomplished by June 1, 1893, at a total expenditure of about \$96,000; when the company ceased work on the canal because of inability to procure funds, except that it kept one team employed

which continued excavation work until October 1895; from that time the Farmers Canal Company did no further work upon the canal. As then constructed there were 5,661.5 acres of land susceptible of irrigation from the canal and other lands lying under the Enterprise and Ramshorn ditches to the amount of 2,540 acres which were also susceptible of irrigation from this canal had not the Enterprise and Ramshorn ditches been built to irrigate such lands.

Prior to 1897 not more than 500 acres had been irrigated annually from the canal; prior to 1907 not more than 2,000 acres, in 1907, 5,000 acres; in 1908, 7,000 acres; in 1909, 10,000 acres, and in 1910, 20,000 acres of land were irrigated from the 530 canal.

In 1897 and 1898 work was done by the company and users of water with its consent, in repairing the canal and protecting its banks and headgate. After work ceased the company endeavored to sell its bonds and to exchange bonds with different contractors for the purpose of building a canal, which negotiations continued until after the mortgage upon the property was foreclosed.

The stipulation sets out with much particularity that at various dates in a period extending from January 14, 1888 until the 1895 act took effect the other plaintiffs or their grantors, except the Steamboat Ditch Company and the Gering Irrigation District, each posted notices and duly filed and recorded the same, claiming various amounts of water from the river, and that each constructed canals and appropriated the amounts of water it now claims in the petition and cross-petition.

The Steamboat Ditch Company made application to the state board of irrigation under the 1895 act on October 22, 1895, and the Gering Irrigation District on March 15, 1897, for permits to appropriate water. Permits were granted, their canals were constructed, proofs filed with the state board as to each of said claims, and a certificate was issued to the Gering Irrigation District the priority dating from March 5, 1897.

In May, 1895, the county clerks of the two counties in which the lands irrigated lie made transcripts of the notices of appropriation on file in their respective offices and transmitted them to the secretary of the state board in whose office they were filed on May 31, 531 1895. After the transcript was filed the secretary sent to each of the claimants named in the notices a blank claim to be filled out. A copy of this blank is attached to the stipulation. This blank is in form an affidavit and sets forth the name of the claimant; the purpose for which water is claimed, the name adopted for the ditch, the source of the appropriation, its amount, the location of the headgate, the length of the ditch, the sections of land through which the canal passes, together with a plat showing the same; the portions of the canal completed or not completed, the dimensions of the uncompleted portions, total excavations, length of fluming required, material removed and fluming completed, estimated cost, expenditure thus far incurred, land to be irrigated, time of beginning work, when work were or will be completed, whether claims are

made on account of application of the water to a beneficial use without objection or by posting notice and filing the same, when water was or will be turned into the ditch, acres actually irrigated and estimated to be irrigated, and the relation which the affiant bears to the ditch, canal or other work.

On August 20, 1895, the state board adopted resolutions providing and establishing at large and in detail the procedure and practice of the board in ascertaining and adjudicating water rights already vested, and for the consideration of new applications for the use of water. It also provided for practice and procedure in case of the contest of claims. These rules provided for notice, and for hearings, rehearings and appeals.

532 Prior to June 5, 1896, the rules by the state board were printed in full in pamphlet form, and as so established and published were accepted by the state board and its secretary in matters of procedure thereafter. On the 5th of June, 1896 the secretary mailed a notice with a copy of the rules to each and all of the parties to this suit or their predecessors in interest. This notice was as follows:

"Office of State Board of Irrigation.

LINCOLN, NEBR., June 5, 1896.

Notice.

"Notice is hereby given that the hearing in the matter of adjudicating rights to the use of water claimed prior to April 4th, 1895, within the water-shed of the North Platte and Platte rivers, will be held for the several counties therein, by an officer of the State Board of Irrigation at the places and upon the dates indicated, as follows (omitting other counties):

"For Cheyenne and Banner counties, in Bayard, on Tuesday and Wednesday, July 14 and 15, 1896.

"For Scotts Bluff and Sioux counties, in Gering, on Friday, July 17th, 1896, at office of O. W. Gardner.

"Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing the necessary proofs, if any be required, to sustain their claims; otherwise said claims will be dismissed.

STATE BOARD OF IRRIGATION,
W. R. AKERS,

State Engineer, Secretary."

533 This was the only notice forwarded by the board or its secretary to any of the parties to this action.

On and prior to the 17th day of July, 1895, the owners of the Brown's Creek, Chimney Rock, Castle Rock, and Alliance ditches procured to be filled out, verified and filed with the secretary by some of the officers of their respective companies, the blank forms sent out by the secretary.

On July 14 and 15 the secretary at Bayard, Nebraska, made inquiries and took evidence as to the claims of the owners of Chimney Rock, Nine Mile, Alliance and Logan canals and the claim of the Belmont canal was submitted on the record without evidence. On July 17 the secretary made inquiries and took evidence at the office of O. W. Gardner in Gering, Nebraska, in reference to the claims of Yorick Nichols and Carrol Nichols and the owners of the Enterprise, Castle Rock, Minatare, Center and Farmers canals. No contest was made as to any of the claims. The evidence was reduced to writing and made a matter of record in the office of the secretary.

The stipulation then sets out the evidence offered in behalf of the Farmers Canal Company. This shows in addition to the facts already stipulated that the cash investment was something over \$100,000 and that the canal was designed to irrigate 80,000 acres; that the canal did not strike the large bodies of land until the lower end and that the company expected to resume work in the near future and were still negotiating in order to procure money. At this time

the secretary allowed the company 30 days in which to file a
534 claim setting out specifically the lands they expected to water.

No other hearing with reference to the above claims or either of them was ever applied for, ordered or held, except that the Steamboat, Castle Rock, Belmont and Alliance ditches had rehearings on their respective applications subsequent to April 7, 1897 without notice to other claimants.

The Farmers Canal Company through an officer filled out the blank claim affidavit and filed the same on September 19, 1896 claiming 1142-6/7 cubic feet per second of time with priority from September 16, 1887.

On January 7, 1897 the secretary rendered an opinion on the claim of the Farmers Canal Company, made the same a matter of record in his office and forwarded a copy to the company, but no copy or notice of the opinion was sent or given to any of the other claimants for water; on the same day the secretary filed written opinions allowing the claims of the Enterprise, Minatare, Castle Rock and Central ditches and at various dates from January 8, 1897, to January 28, 1897, opinions were filed allowing the claim of the Nine Mile, Winter's Creek, Ramshorn and Brown's Creek ditches and adjudicating their respective priorities.

On April 7, 1897 the state board without notice other than may be imputed by law caused a resolution to be entered upon its record affirming the findings of the secretary as to the claims of these parties except Castle Rock which was finally approved on September 22, 1897. None of the claimants were notified within 30 days of

the adoption of this resolution, none of the plaintiffs ac-
535 quired any knowledge or information concerning the same for several years after the adoption thereof.

At various dates in August and September, 1898, other written opinions were filed as to the claims of the Belmont, Alliance and Chimney Rock Ditch Companies and on January 2, 1897 these opinions were affirmed by resolution as in the former claims. None of

the opinions or resolutions, and no certificates as to priorities or any other information with reference to claims was ever transmitted to the county clerk of the respective counties, nor were any of such documents ever filed or recorded, except the opinion with reference to the claim of the Farmers Canal Company which was filed and recorded in the office of the county clerk of Scotts Bluff county on the 27th of December, 1905.

The stipulation then sets forth at length the default of the Farmers Canal Company upon its bonds; the foreclosure of the trust deed; and the purchase at the foreclosure sale of all the property of the company by Roberts Walker on December 23, 1901. It also recites the filing of an application in the office of the secretary on April 14, 1902 by one William Frank to appropriate water for a canal to be built along substantially the same line; the filing of protests by that company; intervention by the Farmers Irrigation District (which had also filed an application in June, 1902 for water to cover a part of the same territory); that a hearing was had, and the applications denied. That appeal was taken to the district court which reversed the board and that on appeal to the supreme court of the state of Nebraska its decision was affirmed. It is also shown

536 that by the final judgment of the district court the findings of the state board "In so far as it finds the said Roberts Walker as the successor in interest of the Farmers Canal Company entitled to an amount of water from the North Platte river not to exceed eleven hundred forty-two and six-sevenths (1142-6/7) cubic feet per second of time, is hereby ratified and affirmed."

In 1904 the Tri-State Land Company was organized and in February, 1904 it entered into an agreement with Roberts Walker for the purchase of the property conveyed to him under the decree of the foreclosure, by which agreement \$60,000 was to be paid to him for the property in the event that the adjudication of the state board should be confirmed by the supreme court, and \$21,000 should be paid for the property if the judgment of the district court in the Frank case should be affirmed. After the judgment of the supreme court it received deeds and conveyances from Roberts Walker and from the Farmers Canal Company to the property.

In August, 1905 the Tri-State Company began the reconstruction and enlargement of the canal and also began to excavate reconstruct and enlarge that portion of the canal lying below the 19 mile portion through which water had been theretofore conducted.

In 1905 it expended in resurvey, reconstruction, machinery, tools and labor \$133,066.46; in 1906 and 1907 work was prosecuted so that in the spring of 1907 the canal was constructed full size to a distance of 40 miles below the headgate. In September, 1906 application was made to the state board for leave to construct
537 a needle dam across the river which was granted in October, 1906, work begun and \$8,000 expended thereon. In that year the company expended in enlargement, construction, deepening and widening \$499,481.87; in 1907 the amount expended on dams, waste way, construction, etc., amounted to \$323,386.87 and the canal at the close of that year was completed for 60 miles and

was capable of irrigating 60,000 acres of land. In 1908, \$52,410.67 was expended and in 1909, \$464,535.13 was expended and at the close of that year the canal was capable of irrigating all of the land described in the opinion of the secretary and the claim of the Farmers Canal Company. The amount expended in 1910 is also set forth but this we deem immaterial under the issues. Before this action was begun the Tri-State Land Company sold and conveyed to the Farmers Mutual Canal Company all of its property taking in payment therefor the stock of said latter company. It now controls a majority of the stock but has sold parties under its canal some 25,000 shares.

The average flow of the North Platte river during the last half of July and in August, September and October at or near the headgate of the canal of the Tri-State company does not exceed 800 second feet and frequently runs as low as 300 second feet; that in those months in 1910 the Tri-State Company diverted from 300 to 400 second feet and during portions of the time this diversion exceeded all the water flowing in the bed of the river at that point; that while the Tri-State was diverting all the water flowing in the river at its headgate water had come to the surface below and was flowing in the river so that some of the plaintiffs received a specified part of the water they were entitled to. In July, 1910,

the state board caused the headgates of the canals of all the parties to this action except the Tri-State Company to be closed in order to allow the water to flow to an alleged prior appropriator whose canal is located near North Platte, Nebraska. Because of the rendition of the opinion on the claim of the Farmers Canal Company and the resolution of the state board said board refused to close the headgate on the canal of the Tri-State and the board claims that the Tri-State has a prior right to any of the parties to this action to divert 1142-6/7 second feet as needed; that unless restrained the Tri-State Company will, under the direction and permission of the state board, divert the full amount of water claimed by it even though the diversion consumes all the water flowing in the river.

The irrigated lands have been used for the raising of diversified crops, but certain crops require irrigation during July, August and September; that the crops which require irrigation during these months are the most profitable and remunerative; that in case any of the lands under the ditches do not receive water during these months the owners will be compelled to raise less remunerative crops, or will be compelled to procure reservoir water at an added expense.

This terminates the stipulation of facts.

The questions involved in this case are of the deepest importance not only to the parties actually before the court but to every owner of irrigated land in the state of Nebraska, since the plaintiffs challenge all right and authority of the state board of irrigation to adjudicate priorities of appropriation under the act of 1895. If this contention be upheld then more than a thousand adjudications of prior claims which have been made by that board since the time of its first organization until to-day, a period

of over 16 years, are absolutely void. Moreover, whatever the conclusion of the court may be it is almost inevitable under the peculiar circumstances of the case that one party, or the other will suffer serious loss. It is, therefore, with a deep sense of responsibility and a keen appreciation of the serious results not only to the parties before the court but to a vast number of water users in the state of Nebraska that we approach the consideration of the questions involved.

The appellants contend, first, that the district court had no jurisdiction to establish priorities, that being exclusively for the state board; second, that the rights of the defendants were fixed and determined by the state board in the Frank case as affirmed by the supreme court and that any attack thereon in a collateral proceeding can be of no avail; third, that there was no forfeiture; fourth, that by their own conduct the plaintiffs are estopped to assert any right as against the defendants' claim.

On the other hand, plaintiffs contend that defendants never acquired an appropriation for more than the amount of water allowed by the district court for the reason that although the preliminary steps—the posting and recording of notice—were taken and
540 the intention to apply water for beneficial use existed, yet the work was not prosecuted to completion with diligence and water in excess of the amount allowed was not conducted to the place of intended use and applied within a reasonable time. It is also contended that the Farmers Canal Company had no vested appropriation at the time the Irrigation Act of 1889 was passed.

With reference to the claimed adjudication by the state board it is argued, first, that that board never made a final adjudication or an adjudication intended to be final; second, that the board does not possess power or jurisdiction to enter an order or decree conclusively establishing rights acquired prior to the act of 1895, for the reasons that the entry of such an order would require the exercise of purely judicial powers which such board does not and cannot possess, and further, that if it is possessed of judicial powers the method provided by the statute for adjudicating such rights does not constitute due process of law; third, that the manner in which the board proceeded did not constitute due process of law and its proceedings so far as they purport to be conclusive adjudications are absolutely void. It is also contended that the opinion in the Farmers Canal Company's claim is void because it attempted to award an appropriation in excess of the claim made. The plaintiffs also deny that this proceeding is a collateral attack upon the adjudication of the board and maintain that this is a direct attack upon an order
541 made in excess of jurisdiction and that the proceedings of the board were erroneous to the extent that it would be unconscionable to permit them to stand. It is further contended that if any appropriation in excess of 28 second feet of water was ever acquired by the defendants, the same has been lost and forfeited by non-user; and as to the claim of estoppel it is argued that the mere fact that plaintiffs remained silent and did not assert any hostile claim is entirely insufficient to constitute an estoppel. It

is also maintained that the opinion of the state board in the Farmers Canal Company claim did not purport to adjudicate a vested and completed appropriation for any definite quantity of water, and that the right of that company was limited by the opinion to water acquired for such lands as should be irrigated prior to September 1, 1905; that the limitation of the appropriation, if construed to be in excess of the jurisdiction of the board, if exercised from the opinion radically reconstructs it and would render it either void or make it reach a result contrary to what was intended and declared; that if construed as an attempt to adjudicate and perfect an appropriation of more than 7.15 second feet such excess is unsupported by any recorded statement of claim or evidence, and was beyond the jurisdiction of the board; that if it be assumed that the adjudication was valid, then by non-user of any water in excess of 28.57 second feet, together with the use during ten years by the other parties of all water in the river during low stages has occasioned by prescription a loss to defendants and a corresponding gain to plaintiffs in the order of their priority.

542 Much of the argument in behalf of some of the plaintiffs discusses the question as to what constitutes an appropriation, and it is maintained with much force that there can be no valid and vested appropriation until the water diverted has been actually applied to a beneficial use. Many decisions of the courts of Colorado and other states are cited to uphold this contention. A different view is taken in the brief of counsel appearing for the Belmont Company and Alliance Irrigation District. Quoting and construing the statutes of 1889, he says: "The legislature never meant to encourage any one to invest their money in an enterprise, supposedly for a public good, and then to take away from him or them their appropriation simply because the land owner did not take the water within a specified time—that was a provision of subsequent legislation. The principle of the application of water to land before the absolute vesting of the appropriation was not of the essence of the act. * * * There is nothing in the act that in any wise indicates that water must be applied to land in order to make the appropriation absolute. The act provides that within a certain time after the posting of the notice, actual work of construction must be begun and in good faith carried forward to completion, and that 'by completion is meant conducting the water to the place of intended use,'—to such place on the line of the canal as the land owner desires to receive it into and carry it through his laterals." "The act of 1895, Sec. 28, speaks of the application of water to a beneficial use, or for beneficial purposes, but the act of 1889 nowhere does. After a canal was constructed under the prior act, 543 therefore, and the water conducted through the same, if the owner at all times stood ready and willing to carry water for such land owners as would take it, he made all and the only application that he could make, and all that the act expected him to make, and his right to his appropriation continued as a developing right until all lands under the canal were using water, and thereupon ripened into a complete appropriation." Counsel for other plain-

tiffs also concedes "In some states, by statute an appropriation is treated as effected when all the works are completed, the water is available for use, and there are lands reached by the system ready to be tilled by its occupants. In other states, by statute, the appropriation is not deemed complete until the beneficial use of water occurs; such was the rule prior to legislation." See also sections 8, 9, 10, ch. 68, laws 1889, defining appropriation and completion of work. This subject is also considered to some extent in the monographic note to *Nevada Ditch Co. v. Bennett*, 60 Am. St. Rep. 777, 816, (30 Ore. 59), where the commentator says: "The appropriation of water for sale to others is authorized by the statutes of the states in which it is valuable for that purpose, and, in many instances, the chief, and even the sole, object of an appropriator is not that of any use by him in and upon his own lands or mines, but the sale of the water to others who have mines to be worked or lands to be irrigated. In cases of appropriation for the purpose of supplying

544 water to others, we do not understand how it can be said that the use of the water is an essential element of its appropriation. If the intended appropriator constructs the works and appliances necessary for the diversion of the water and the carrying of it to points where its use is desirable and profitable, and has actually carried it there, or is ready and willing to do so, and offers it to all persons who are willing to pay for its use, we apprehend that his appropriation is complete, though the persons to whom it is thus offered refuse to receive or use it. They certainly cannot thus defeat the rights of the diverter." What the rights of the canal owner or of subsequent takers may be in such case it is unnecessary here to consider. A discussion as to this point may be found in *Sowards v. Meagher*, 37 Utah, 212, 108 Pac. 1112, 1117. This court has repeatedly said that a canal company is to a certain extent a public service corporation; that it does not own the water that it carries but acquires by appropriation the right to divert the same and to charge a reasonable fee for the carriage of the same to the lands upon which it was designed to be used. *Paxton & Hershey I. C. & L. Co. v. Farmers & Merchants I. & L. Co.*, 45 Neb. 848; *Castle Rock I. C. & W. P. Co. v. Jurisch*, 67 Neb. 377; *McCook Irrigation & W. P. Co. v. Crews*, 70 Neb. 115. Without further discussion we are content to adopt the views as to what constitutes an appropriation under the act of 1889 thus stated by counsel so far as relates to appropriation by a canal owner who is a carrier of water to be applied to a beneficial use upon land owned by others, with the reservation, however, that the water—formerly—must have been applied within

545 a reasonable time in order to retain the first right to take it from the river, and—now—it must be applied within the time limited by the statute. *Comp. St. 1911, ch. 93a, art. II, sec. 18.*

One of the principal questions argued in the case is with respect to the validity and effect of the proceedings of the State board of irrigation when it undertook to adjudicate priorities under the command of section 16, ch. 69, laws 1895 (*Ann. St. 1909, sec. 6795*). We deem it unnecessary here to set out at length the provisions of the statute with reference to the adjudication of priorities or the order

which was made upon the claim of the Farmers Canal Company by the state board of irrigation. These are all set out at length in the opinion in *Farmers Canal Co. v. Frank*, 72 Neb. 136. In that case it was held: "The powers of the state board of irrigation exercised under section 16, article II, chapter 93a of the irrigation act of 1895, are quasi judicial in their nature, and an adjudication by it of a right of priority of appropriation of water made before taking effect of the act of 1895, after proper notice, is final, unless appealed from, and cannot be collaterally attacked." That case was an appeal from an order of the board refusing two applications for appropriations on the ground that appropriations already were in existence for the same lands. The court decided in effect that in a matter properly before it, the board had allowed an appropriation as claimed and that it was concluded by its own prior order and adjudication.

We are asked by the plaintiff to re-examine this doctrine which it is earnestly contended is entirely erroneous and is based upon
 546 a misconception of the powers and duties of that board. In view of the fact that only a few pages of the briefs in that case were devoted to the discussion of this question, and that, as the writer recalls, but a short time was spent in oral argument we have considered the learned and exhaustive arguments presented at this time and will endeavor to discuss them as succinctly as we may.

It is first contended that the state board does not possess power or jurisdiction to enter such an order or decree. It is argued that under the constitution the government of the state is divided into three distinct departments, the legislative, the executive, and judicial and no person or collection of persons being one of these parties shall exercise any powers belonging to either of the others, except as heretofore expressly directed or permitted.

The same contention was first made in this court in the case of *Crawford Co. v. Hathaway*, 60 Neb. 754. The case was decided on another ground but on this question in the opinion by Norval, C. J., it is said: "It is conceded by appellant that any right it may have in the premises arises out of the irrigation act of 1895 (Comp. St. 1897, ch. 93a), and that without that act neither the appellant nor the numerous cross-petitioners have any right to the waters by them sought to be appropriated, unless the act of 1877 may have abrogated the common law rights of riparian owners, a question to which we

will advert later. If this irrigation act of 1895 is valid and
 547 constitutional, the trial court properly refused to try and determine the right of priority between these litigants for the reason that the board of irrigation provided by that act is thereby given exclusive original jurisdiction to try those questions, and the same has not been by it heard or in any wise determined. Appellant admits the truth of this proposition, but seeks to avoid it by contending that that portion of the act which erects a board of irrigation, giving it exclusive judicial powers, is a derogation of section 1, article 6, of the constitution, in that the legislature by said act sought to erect a new judicial tribunal in place of one of the regularly constituted courts of the state. Without deciding that that portion of the act is unconstitutional, we will assume its invalidity for the purposes

of this case, for a cursory examination of the act will convince any one that the board of irrigation was one of the inducements for its passage, and it is so interwoven with the whole act as to make it impossible to declare this portion thereof invalid without also effecting the destruction of the remainder of the act." On motion for rehearing an additional opinion was written by Norval, C. J., 61 Neb. 317. The opinion discusses, at length, at pages 325, to 328, inclusive, the question as to whether the act is unconstitutional for the reason that judicial powers are conferred upon the board. The writer though evidently of the opinion that if the provisions with reference to the board fall the whole act would fall with them and implying, at least, that the act is valid, says, the court expressly refused to decide this question because it "is not involved in the case at bar" and "It merely decides that if the

548 act in question is valid, plaintiff proceeded in the wrong forum," and it was said that if unconstitutional with respect to the judicial powers of the board it is void as a whole. A rehearing was had and in an opinion prepared by Holcomb, J., the purpose of the action was stated more fully, 67 Neb. 325. It seems that the action was brought by the plaintiff below to have adjudicated the rights of 12 persons to the use of water flowing in the White River and to enjoin Hall, a riparian owner, from interfering with the headgates and works connected with an irrigating canal being constructed by the plaintiff. The trial court refused to try the case on its merits for the reason that the water rights of the respective parties had not first been determined by the state board of irrigation. This court took a different view as to the rights of riparian owners and the judgment was reversed and the cause remanded with directions to try the case. The opinion of Judge Holcomb after considering the question at some length, says at page 367: "Powers of the same general nature and character are conferred upon almost every administrative body known to the statute, and regarding which it has frequently been decided are of a quasi-judicial nature, and yet such bodies are invariably held to be administrative, and to in no way conflict with the constitutional provisions regarding officers and bodies upon whom judicial power may be conferred. The state board of transportation, as heretofore organized in this state, the constitutionality of which has been invariably upheld when attacked, in

549 all respects, save as to the manner of passing the law providing for its creation, is a fair illustration of the validity of legislation of this character. Numerous other boards and offices created by statutes, of an administrative character, and yet possessing powers of a quasi-judicial nature, might also be referred to if thought to serve any useful purpose. For the reasons given, we are of the opinion that the sections of the act in question are not obnoxious to the constitution on the objections raised by counsel, and that the authority of the board of irrigation to make the determinations contemplated by the act, and the requirement of its approval as a condition to the right of appropriation under the provisions of the act, is a valid exercise of legislative power." Citing *Farm Investment Co. v. Carpenter*, 9 Wyo. 110. As to this point Judge Sedgwick con-

curred saying: "Those parts of the irrigation act of 1895 which provide for a board of irrigation, and the adoption of the rule of ownership of water by appropriation, are constitutional."

In *McCook Irrigation & W. P. Co. v. Crews*, 70 Neb. 115, the constitutionality of the irrigation act of 1895 was again challenged but the law was again sustained by the court.

In the face of these decisions it hardly seems necessary to again consider the question but we have done so, and have examined further authorities. It is a matter of common knowledge that both in the administration of the laws of the United States and of the several states, board- of individuals, for the purpose of exercising executive or administrative functions are often compelled to

550 inquire into and determine questions, requiring the exercise of powers judicial in their nature. Some of such determinations are often, by virtue of the statutes defining the functions and power of the tribunal, final and decisive; and others are made reviewable by appeal to the courts. For example the determination of the General Land office with respect to controversies over claims to the public lands; the action of boards of medical examiners in granting or refusing diplomas to persons seeking to practice medicine; the determination by boards of county commissioners in this state that the formation of a drainage district will be conducive to public health or that the establishment of a highway is necessary; the judgment of a commission created by congress to pass upon the validity of private land claims in territory ceded to the United States. Numberless other instances may be adduced. Whether reviewable by the courts or not, the exercise of such powers by tribunals of this nature has seldom been held to be a violation of the constitution in this respect. *McGehee*, *Due Process of Law*, 162. 368; *Reetz v. Michigan*, 188 U. S. 505; *Gardner v. Bonestell*, 180 U. S. 362; *Bates & Guild Co. v. Payne*, 194 U. S. 106; *People ex rel. Deneen v. Simon*, 176 Ill. 165; *Farm Investment Co. v. Carpenter*, 9 Wyo. 110; *State v. Thorne*, 112 Wis. 81, 55 L. R. A. 956; *Gee Wo v. State*, 36 Neb. 841; *Lincoln Medical College v. Poynter*, 60 Neb. 228. We are satisfied with the conclusion reached by this court in the cases cited which were followed in *Farmers Canal Co. v. Frank*, 72 Neb. 136, and see no reason to change our conclusion in this respect.

551 On the point that the action of the board in adjudicating priorities does not constitute due process of law for the reason that the statute does not specifically provide for notice to the parties, we are of opinion that where a statute under the police power of the state authorizes a proceeding affecting the property rights of any person and does not expressly provide for notice to be given, the right to notice is implied and that where a proper notice has been given under a procedure authorized by the legislature and a party has appealed, he has not been deprived of any of his rights without due process of law. And this is more especially the case where the proceedings are not in the nature of proceedings at law or in equity.

The constitution and the statute will be construed together as one law. *Baltimore & O. R. Co. v. Pittsburg, W. & K. R. Co.*, 17 W. Va. 812, 835; *Paulsen v. Portland*, 149 U. S. 30; *Kentucky Railroad*

Tax Cases, 115 U. S. 321, 334. See also McGehee, Due Process of Law, 82, and cases cited in note to Sterritt v. Young, 4 L. R. A. n. s. 169 (14 Wyo. 146), beginning with page 173. Plaintiffs cite McGavock v. Omaha, 40 Neb. 64, to sustain their proposition. Although the writer of the opinion in that case seems to think that the authorities preponderate in favor of the view that notice must be prescribed in a statute in order that it be valid, the court expressly confines the holding to the proposition that if notice is not given in condemnation proceedings, the right to bring an action for damages is not barred. This case, therefore, is no authority in support of the proposition.

552 By the act of 1895, the legislature committed the duty of prescribing the method of procedure with respect to such adjudications to the state board; that board formulated rules providing for notice, and allowing for hearings, rehearings and appeals. We think the legislature had power to delegate this duty to that body and that the fact that the method of procedure was not embodied in the statute does not render due process lacking in the proceedings.

It is contended that the opinion of the secretary was void because it was in excess of the claim filed by the company. It is assumed by the plaintiffs that the "claim" adjudicated by the board was the affidavit filed by the Farmers Canal Company but in this we think they are in serious error. The "claim" which the board investigated and which the statute mentions is "The claim for appropriation now on record," section 16, and it is as to this claim, and other claims based upon actual use without posting, that "the method of determining the priority and amount of appropriations shall be determined by the said state board." Moreover, in the 1889 report of the state board the method of adjudicating claims is set forth and it is shown that the copies of notices posted and filed transmitted by the county clerks, and the claims presented to the board by parties who neglected to post notices but who had previous to 1895 appropriated and used water constituted according to its practice the claims to be adjudicated. We are of opinion that even if no blank claim affidavit had ever been filed by the company, as in fact none was filed until long after

553 the hearing had been had, the board would still have had power and jurisdiction to determine the validity and priority of claims "now on record." The rules of the board clearly show that the affidavit filed by claimants under recorded notices was intended to be taken as evidence and not as a pleading. The opinion shows that "the claim * * * is made by virtue of posting three notices of appropriation at the proposed point of diversion" setting forth specifically the time of posting and recording each notice. The authorities cited to sustain the proposition that a judgment in excess of the claim made in the petition is void are therefore, inapplicable and the finding was not in excess of the claim made.

In this connection plaintiffs' counsel say: "If we assume that the board had jurisdiction to hear and determine the claim of the Farmers Canal Company as against other claimants to the use of water from said river, then we are perfectly willing to concede that if the

board made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of at that time, it would be final provided that said company claimed an appropriation to the extent of its allowance by the state board, and other claimants had knowledge thereof; but we do not concede that if a claimant only asks for an appropriation of 10 cubic feet of water, the state board has jurisdiction to grant to him one thousand cubic feet of water; or if he makes application for a permit to appropriate or claims an inchoate or incomplete appropriation, that the

state board has jurisdiction to allow a completed appropriation." By this concession in the brief it would seem that

554 plaintiffs themselves take the same view as this court did in the Frank case since by the several notices which were matters of public record of which the plaintiffs were charged with notice, the Farmers Canal Company claimed an amount of water greatly in excess of the allowance made to it by the state board. The fallacy in the argument of plaintiffs' counsel is that the posted and recorded claims, which under the statute were the basis and the moving cause for the action of the board are treated as of no force or effect, and the claim affidavit subsequently filed is assumed to be a pleading by which the authority of the board is limited.

It is insisted that because the act of 1895 provides "When the adjudication of a stream shall have been completed it will be the duty of the state board to make and cause to be entered of record in its office an order determining and showing the several priorities," etc. Section 19, the action of the board upon the claim of the Farmers Canal Company was void for the reason that the adjudication on the stream had not been completed when the opinion was filed and affirmed. It is shown, however, that hearings had been had upon all the claims to the water from the North Platte river, that the secretary proceeded to examine and render opinions upon each claim, that on January 7, 1897, opinions were rendered by him upon the claims of the Farmers Canal Company and others and from time to time opinions were rendered on other claims. On April 7, 1897,

the opinions upon these and other claims from which appeals 555 were not taken, were affirmed by resolution of the board. A

hearing was had as to the claims of several of the plaintiffs and a subsequent resolution adopted on January 2, 1899, affirming their opinions rendered on rehearing. It would seem that while the secretary filed his opinion on each claim as soon as he had reached a conclusion with regard to its validity and priority the board itself took no action in the matter until the investigation was completed, when it affirmed the opinions en masse. The fact that rehearings were granted in a few cases could not operate to divest the board of the power it possessed and had already exercised. Even if the decision was premature we are inclined to the view that it would be a mere irregularity and not a void act.

Plaintiffs also argue that rule 3 of the board implies that the adjudication provided for was not intended to be final because it provides "The first adjudication of the rights of claimants shall be conducted for the purpose of determining the validity of claims," etc.

This was what was actually done, that is, the validity of the claims, evidenced by the posted and recorded notices claiming water in specified quantities with priorities dating from the posting and recording thereof, were actually determined and when this was done no further adjudication upon this point could be had. It appears also from an examination of the entire body of rules that no other hearing or adjudication is provided for thereby, except in cases of contests or rehearings before the secretary or the board.

It is also contended that because no certificate was issued within 30 days after the determination of the board its adjudication 556 was not final and there was nothing from which any of the parties could have appealed to the district court. The limitation of 30 days in which to issue the certificate we think is merely directory. The certificate required by the statute does not constitute the adjudication but is merely evidence thereof.

It is next insisted that the language of the opinions themselves shows that they were not intended as final adjudications, that the board and its secretary followed the practice which seems to have prevailed in the courts of Colorado by which in proceedings to settle water rights decrees may be rendered both final and interlocutory in their nature; final and conclusive as to water which the court found had already been applied to a beneficial use, and conditional or interlocutory in that they recognized and declared the capacity of the canal and the quantity of water required for future use, and decreed a right to the same contingent upon the exercise of diligence in constructing the ditch and applying the water from the same to a beneficial use. It is not improbable that the board of irrigation had the Colorado practice in mind. There is no statute in this state authorizing such conditional decrees in a proceeding brought before the state board to ascertain and adjudicate priorities. The statutory duty of the board in this connection was to ascertain the rights which had become vested before the taking effect of the act of 1895 and the extent of such rights. Their powers were special and limited and could not exceed the statutory grant. After the taking effect

557 of the act of 1895 all water in the streams of the state, the right to appropriate which had not already vested, could only be set apart to individuals by obtaining a permit from the state board under the manner of procedure specified in sections 28 to 31, inclusive, of the act. In so far, therefore, as the board attempted to make a conditional order in such a proceeding its action was unauthorized and nugatory. But it is contended that the holding in the Frank case that the adjudication may be upheld with the ultra vires conditions eliminated is erroneous and should be set aside. In *Shaw v. Kellogg*, 170 U. S. 312, the controversy was one with respect to the title to a large tract of land in New Mexico, it being contended it was mineral land subject to entry. A congressional grant provided that the land should be selected by the grantees and that it should be vacant and non-mineral. The land was settled by the claimants and the selection reported to the Land Department by the Surveyor General of New Mexico whose duty it was to make the survey and see that the lands were such as the grantees were entitled to select. The

land department approved the survey, field notes, and plat, and noted on its maps that the land had been segregated but the certificate of approval entered upon the plat filed in the land department by the Surveyor General, under the directions of that department, made the approval "subject to the conditions and provisions of section 6 of the Act of Congress, approved June 21, 1860." This is the

act making the grant and providing that the land shall be
558 "not mineral" in character. The court held that the limita-

tion was beyond the power of the land department to impose, and that the title was valid and not affected by the limitation, saying, "What is the significance of, and what effect can be given to the clause inserted in the certificate of approval of the plat that it was subject to the conditions and provisions of the act of Congress? We are of opinion that the insertion of any such stipulation and limitation was beyond the power of the Land Department. Its duty was to decide and not to decline to decide: to execute and not to refuse to execute the will of Congress. It could not deal with the land as an owner and prescribe the conditions upon which title might be transferred. It was agent and not principal. Congress had made a grant, authorized a selection within three years, and directed the surveyor general to make survey and location, and within the general powers of the Land Department it was its duty to see that such grant was carried into effect and that a full title to the proper land was made. Undoubtedly it could refuse to approve a location on the ground that the land was mineral. It was its duty to decide the question—a duty which it could not avoid or evade. It could not say to the locator that it approved the location provided no mineral should ever thereafter be discovered, and disapproved it if mineral were discovered; in other words, that the locator must take the chances of future discovery of minerals. It was a question for its action and its action at the time." See also *Deffebach v. Hawke*,

115 U. S. 392, 404, where it is said "The land officers, who are
559 merely agents of the law, had no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions it prescribed." By a parity of reasoning, the only authority which the state board had was to adjudicate the validity of the claims filed and determine their priority, under sections 15-27, of the act. This being done its powers and duties in the matter before it were ended and it had no power to impose conditions, no application for unappropriated water being before it for consideration.

Much is said in the plaintiffs' briefs upon the proposition that the powers and duties of the board are administrative in character and the point is sought to be made that controversies between rival appropriators are not within the scope of its powers and duties. This may be granted, and yet, it cannot help the plaintiffs here. The board was authorized under the statute to fix a time for determining the claims of all persons to the waters of the North Platte river which had become vested prior to April, 1895. Notice was given of the time and place of the hearing. All the parties to this suit or their predecessors in interest appeared. The board examined their claims,

passed upon their validity, and fixed their priorities. This was absolutely essential for its own information in order that it might administer and distribute the unappropriated waters. By its rules it provided for the contest of claims made and for a hearing upon the same and for appeals from the decisions of the secretary and board upon such contests. No contests being made as to the rights of any claimant, and no appeal being taken as to the amount and priority of appropriations the matter became settled so far as the board was concerned, and in its future dealings with the waters of the river it was bound to follow the adjudications made and distribute the same in accordance therewith. The supreme court of Wyoming in *Ryan v. Tutty*, 13 Wyo. 122, 78 Pac. 661, in passing upon the statute of that state which grants powers to water commissioners and superintendents to regulate the use of waters by different appropriators according to their priorities, and provides that from the decisions of such officers an appeal lies to the state engineer, and from his decision to the circuit court, while holding that a decision of the commissioner and superintendent as to the right or use of water, although not appealed from is not an adjudication conclusive on the courts, says: "But it is to be observed that the statute clearly contemplates that such official action shall be based upon a record of adjudicated priorities. They (the officers) are not vested with arbitrary control, but are required to divide the water according to the prior rights of the interested parties. * * * Primarily, the commissioner is authorized, whenever legally called upon, and it is his duty, to see that the water of a particular stream is diverted in accordance with the established priorities, and to prevent any one from taking more water than he is entitled to take to the injury of others. He is not authorized to determine priorities. * * * The only object of his inquiry is that he may justly and fairly make a temporary distribution of the water in conformity with the adjudicated priorities." The italics are ours. It will be seen, therefore, that the question involved here is not decided in that case adversely to the views of this court though it is cited by plaintiffs as upholding their contention. *Boulder & Left Hand Ditch Co. v. Hoover*, 48 Col. 343, 110 Pac. 75. The same principle was announced by this court in *Farmers & Merchants Irrigation Co. v. Cozad Irrigation Co.*, 65 Neb. 3.

In considering whether the appropriation had been lost by lack of diligence by non-user or abandonment these facts must be considered. The stipulation shows that prior to June 1, 1893, about \$96,000 had been expended upon the canal. It was then of sufficient capacity to irrigate 30,000 acres of land within a distance of 19 miles from the headgate. The 25 miles below the 19 miles mentioned had been opened up at various places to a full depth and nearly one-fourth of the construction work performed but had not connected up with the 19 mile section in which water was flowing.

The canal was kept in repair until in 1898 by the Farmers Canal Company and thereafter by land owners along the canal with the consent of that company, until it was taken possession of by the Tri-State Land Company. Up to the time of the foreclosure of the trust deed the company endeavored to sell additional bonds or to exchange

them with different contractors for the purpose of extending and finishing the canal. The action to foreclose the trust deed securing the bonds was commenced in 1898, on December 23, 1901 the property was sold, and the sale was confirmed in February 1902.

On April 14, 1902, Frank filed his claim which if allowed would have destroyed the appropriation except for water sufficient to irrigate 5,000 acres. This was followed by the claim and intervention of the Farmers Irrigation District which if allowed would have had the same effect. Protests against Frank's application were filed on behalf of Roberts Walker claiming the prior appropriation. These proceedings before the board and by appeal to the district and supreme courts continued until November 18, 1904, when they were terminated by the judgment of the district court in pursuance of the mandate. This recites, "The findings and jurisdiction of the state board of irrigation, in so far as it finds the said Roberts Walker as the successor in interest of the Farmers Canal Company entitled to an amount of water from the North Platte river not to exceed eleven hundred forty-two and six-sevenths ($1142\frac{6}{7}$) cubic feet per second of time, is hereby ratified and affirmed.", and it was adjudged that Roberts Walker "has appropriated and is entitled to divert from the North Platte river for irrigation purposes eleven hundred forty-two and six-sevenths ($1142\frac{6}{7}$) cubic feet of water per second of time, and has a vested, subsisting right in and to said appropriation."

The Tri-State Company was organized in January, 1904. In February, 1904, it made a contract with Roberts Walker to purchase the canal companies' property the amount to be paid depending upon the result of the litigation. Relying upon the judgment the Tri-State Company paid the full amount stipulated for the rights of Roberts Walker and received a conveyance of the property which was recorded on February 21, 1905 in the office of the register of deeds in Scotts Bluff county. It immediately began the enlargement and construction of the canal expending over \$100,000 that year. It pursued this work in 1906 and diligently and actively prosecuted the work until its completion so that the canal is now capable of furnishing water for the entire 800,000 acres of land which it was constructed to serve.

On September 13, 1906, it made an application to the state board of irrigation for leave to construct a needle dam across the river below the headgate of its canal. That it had a valid existing right was recognized by the state board at that time when it granted leave to construct a needle dam in the river below its headgate for the purpose of diverting sufficient water into its canal and this right has been since recognized by that body in its administration of water from the river.

It seems evident that the purpose to carry on the enterprise and construct the canal in its entirety was never abandoned by the owners, and it has now been carried to completion. It is probably true that no actual construction work was performed upon the canal for about 10 years, but from the time that the foreclosure suit was begun until the final decision in the Frank case, the title to the property and right to the appropriation were in such hazardous and uncertain

condition that few men would have had the temerity to invest money to any extent in the further development of the plan. The enterprise was of such a nature as to require large expenditures and years of effort.

564 While recognizing the rule that in the final analysis it is the application of water to a beneficial use within a reasonable time that conditions the power of the appropriator to retain his right to carry water and that an appropriator of water to be carried to be used by others must carry on his works with diligence or lose his priority, we are convinced that under all the facts in this case it would be highly inequitable and unjust at this time to enforce a forfeiture on the ground of lack of diligence, non-user or abandonment. We are aware that it has been said that pecuniary difficulties are no excuse for failure to carry on such work, but an examination of the cases in which this doctrine has been laid down shows that the facts are so dissimilar from the case at bar that we do not feel justified in adopting them as forceful authority in this case.

This precise question may never arise again in this state for by an amendment made in 1911 to section 18, ch. 93a, Comp. St., a time is specifically limited for the application of water and a method of procedure established by which the question of non-user or lack of diligence is determined.

Upon the question whether, even if the other questions be decided in favor of plaintiffs and against defendants, plaintiffs are entitled to the aid of a court of equity and are not estopped by reason of their own conduct, it is necessary to examine the facts as admitted by the pleadings and the evidence.

565 All parties who took any part in the hearing knew or were charged with knowledge that notices had been posted by the Farmers Canal Company and recorded in the office of the county clerk prior to the taking effect of the act of 1895. The act of 1889 by authorizing such filing and recording constituted the same a public record of which all persons interested were bound to take notice. These notices showed that the Farmers Canal Company by the first claimed a quantity of water sufficient to fill a canal 40 feet wide on the bottom and to carry water to a depth of four feet, and by the others, water in addition to its former claim to the amount of 200,000 miners' inches, the canal to be 80 feet wide and 8.84 feet deep at point of divergence, slope one to one, with an average grade not greater than two feet to the mile. Under section 32 of the act of 1895, 50 miners' inches shall be deemed equivalent to a cubic foot of water per second, so that in the aggregate the waters claimed largely exceeded in quantity the 1142-6/7 cubic feet per second, which were allowed. Indeed we find no specific denial of this knowledge either in the pleadings or the evidence. After denying knowledge of the filing of the claim of the Farmers Canal Company with the board, of the hearing thereon, and of the opinion and resolution, the petition alleges, "nor did the plaintiff herein or its grantor acquire any knowledge whatever of the above mentioned transactions of said board and its secretary for several years after they had taken place."

This is not a negation of knowledge of the claims of the Farmers

Canal Company but only of knowledge of the transactions of the board. It also amounts to an admission that it required
566 knowledge "several years after" 1896 and 1897 when the transactions mentioned took place. The expression "several years after" is vague and indefinite and since the language used must be construed most strongly against the pleader it cannot we think be taken to mean a space of about nine years from July, 1896, when the hearing was had, and January 1897, when the resolution passed, and the time when the defendants began the work of reconstruction and enlargement on a large scale in August, 1905. So that there is no denial of want of knowledge even of the board's action before the latter time.

The petition alleges that the defendants "have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte river to the extent of 1142 6/7 cubic feet per second of time * * * which is prior to the right of appropriation acquired by this plaintiff." The time at which these declarations were made is not disclosed. But if only recently made the pleader would, no doubt, have taken advantage of the fact. The evidence also shows the mailing of notices and of printed rules of procedure to the plaintiffs and that at different dates from June 24, to October 1895, the plaintiff's grantor and ten other claimants, including the Farmers Canal Company filed claims before the state board and that on July 17, 1896, another claim was filed by the owners of the Minatare ditch. On the same day that the opinion on Farmers Canal Company was filed by the secretary he also filed opinions in the
567 claim of the Enterprise Ditch Company, plaintiffs' grantor, and in those of three of the other plaintiffs. It is apparent, therefore, that all claimants who filed claims with or produced evidence before the board had notice of its transactions at least to the extent of being aware that a hearing would be had, and were also charged with notice of the rules of practice adopted by the board. The evidence also shows that some rehearings, presumably on request, were had upon claims.

In April, 1902, the Frank application was filed with the state board. In June, 1902, the Farmers Irrigation District also filed a like application. These applications were contested before the board, appeal was taken to the district court and supreme courts. Judgment was rendered on June 9, 1904, in favor of the Farmers Canal Company upholding its prior right to the appropriation it claims.

In 1905 the Tri-State Land Company expended \$133,066.46 in their work on the canal. In August, 1906, it began work on the enlargement of the 19 mile portion of the canal. In the spring of 1907 the canal was constructed to its full size for a distance of 40 miles below the headgate. In September, 1906, it was given leave by the state board to construct a needle dam across the river below the headgate and this work was begun in October of that year. In all there was expended in 1906 in these operations the sum of \$499,491.87. In 1907 a new headgate was built and the

canal further extended at an aggregate cost of \$323,386.87. In 1908 the work was continued at a cost of \$5,240.67. In 1909, \$464,536.13 was expended in extension and improvement. In 1910 work was continued on the headgates, needle dam, waste gate at a total cost of \$198,529.70. The total amount expended by the Tri-State Company in construction from February, 1905 to October 31, 1910, was \$1,651,138.41, of which amount over \$950,000 was expended before the original petition in this case was filed.

The question is whether the plaintiffs could stand idly by while the defendants, openly claiming a prior right to water sufficient to water the lands for which the appropriation had been allowed by the state board, expended nearly a million dollars in the work, and then after the work was practically finished enjoin the use of the water which the works were constructed to carry.

Under section 10 of the act of 1895 the state board is required to prepare and render to the government bi-ennially full reports touching all the matters and duties devolving upon the board by virtue of its office, and it is provided that 2,000 copies of the report should be printed and distributed according to the provision of the law providing for the printing of other state reports. This report is a public document of which we take judicial notice. The report for the years 1897 and 1898 contains a table showing the appropriations from the various streams of the state which had been allowed by the board since its organization in 1895, with the date of priority, and the amount adjudged to each appropriator. This

569 table shows that the Farmers Canal Company of Omaha had been granted an appropriation of 1,142.87 second feet with headgate located on Sec. 3, Town 2, Range 58, Scotts Bluff county, with priority of September 16, 1887, with the conditions mentioned and also shows the amount and priorities awarded other parties to this suit. This table is carried forward in each report published, so that the information therein contained has been available to all parties interested ever since early in the year 1900 until the present time. With all these facts before us we must find that plaintiffs had knowledge of the posted and recorded claims of the Farmers Canal Company; of the passage of the law of 1895 and of its provisions requiring the state board at its first meeting to make arrangements for adjudicating the priorities of all "claims for appropriation now on record"; of the notice to appear before the secretary, and of the rules prescribed by the board as to rehearing, appeals, and contests; of the practice of the board in deciding claims by written opinions, copies of which were mailed to each claimant; of the fact admitted in its reply that ever since the Tri-State Land Company became the owner of the canal "it claimed and still claims the right to 1142 6/7 cubic feet per second"; of the vast undertaking of the defendants in the completion of the canal, of the extensive works of the Tri-State Company in building dams and headgates and in excavation, comparable only to the construction of a railroad, and of the expenditure of hundreds of thousands of dollars in a sparsely

570 settled country. Furthermore, the claims of all the parties except two originated by posting notices on the bank of the stream and recording copies in the office of the county clerk.

When the state sought to determine for its own purposes the rights to the use of water which had vested, so that it might apportion that which still flowed in the river bed subject to appropriation, it gave all of these claimants an equal opportunity to assert their claims. They all took advantage of this privilege, their rights were determined and they all acquiesced. Opportunity for contests of the claims of others which might interfere with the amount of water each claimed was afforded each of them under the rules adopted which were brought to their attention. They filed no contests, took no appeals but remained apparently content to recognize the authority of the board. Relying on these conditions, as well as upon the adjudication the defendants purchased the canal, worked upon it for years and spent vast sums of money in its completion so as to irrigate the specific land which it was originally designated to reclaim. During all these years no claim of superior right to this water seems to have been made, though it must be said that when the supply was short and while the defendants were not using the water it was used by some of the plaintiffs, but this is customary, right, and proper when water is flowing in the stream unused. If a prior appropriator for carriage is not ready to use water, the use of it by another is not equivalent to an adverse user which of itself would give notice of a hostile claim. *Smith v. Duff*, 39 Mont. 374,

102 Pac. 981; *Featherman v. Hennessy*, 43 Mont. 310, 113 Pac. 751; *Ison v. Sturgill*, 57 Or. 109, 109 Pac. 579; *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143. Under these circumstances and having this knowledge it would be contrary to the plainest principles of equity if plaintiffs might stand silently by seeing the defendants engage in such a monumental work under claim of right and utter no word of warning as to their own claims which if eventually established would be depriving defendants of the water which the canal was built to carry, condemn the whole enterprise to failure and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiff after the works were practically finished and the money expended to insist upon claims which had they been asserted in good time would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined.

In *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb. 18, the facts were that the company sought to enjoin the county from erecting a bridge which would take away tolls from a bridge built by plaintiffs. It was shown by the answer that a bridge had been erected by the county a part of which was out of repair and which it was about to repair. The court said: "The silence of the plaintiff when knowing its own rights, and having full knowledge of the steps taken by the defendants to build the bridge, will estop it after the completion of the work, or after large expenditures of money in

572 construction had been made; for such silence lulls to rest instead of warning danger, and in the language of the books, it becomes a fraud." In a case where a mill owner entitled to the use of water as a riparian owner remained quiescent while an irrigation company expended large sums in constructing its canal this court refused to grant an injunction against the use of the water for irrigation, saying: "It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company in good faith in accordance with the purpose of its creation, at a cost of many thousands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first fully advised of both the undertaking and the purpose of the defendant and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact there is no principle more firmly established in the jurisprudence of this country than that a suitor who has by his laches made it impossible to restrain the completion or use of public works without great injury to his adversary or the public will be left to pursue his ordinary legal remedies." *Clark v. Cambridge & Arapahoe I. & I. Co.*, 45 Neb. 798. See also cases cited in each of these opinions. *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. Rep. 592.

We think the cases cited by plaintiffs are so different in the facts before the court that they do not furnish any guide in this case.

573 Whether the original adjudication was more than a mere administrative proceeding for the information of the board or not and even if it should be held that the right to the full appropriation was lost by non-user before the Tri-State Land Company fully constructed its canal, we agree that the plaintiffs are estopped to maintain this action.

In concluding, we may remark that the evidence shows that at the time the state board made the determinations, agricultural irrigation was in its infancy in this state. The volume of water flowing in the North Platte river at various seasons of the year had not been definitely ascertained and the actual flow was largely a matter of conjecture. A number of the determinations made, therefore, were for water in excess of the actual amount which experience has shown was available for the respective enterprises and which the works could convey. Perhaps this fact should be considered by the state board in times of scarcity but this question was not presented and is not decided.

The true test of ultimate right to the water is its actual application to a beneficial use. The spirit and the letter of the statute compel the most rigid economy in the use of water so that the full benefit of it may be derived. If not in use by prior appropriators others may

574 use it. No dog in the manger policy can apply. If the non-use is continued for the statutory time the right ceases, may be forfeited as the statute provides, and more diligent users may acquire the right to its use under the authority of the board. A land owner taking more than he is entitled to is liable in damages to those injured. No appropriator is entitled to more than can be beneficially used or more than the least amount which experience indicates is necessary for the production of crops in the exercise of good husbandry.

We find it unnecessary to consider the questions presented as to the rights of the plaintiffs and cross-petitioners between each other since the result reached eliminates the same.

The judgment of the district court is reversed and the cause dismissed, but without prejudice as to any controversy between the plaintiffs and cross-petitioners.

575 *HAMER, J., concurring in part and dissenting in part:*

I concur in the opinion so far as it reverses the judgment of the district court, and no further. I am unwilling to adopt the views expressed in the opinion and dissent from them. I am unwilling that the case shall be dismissed, and dissent from so much of the opinion as directs its dismissal. Only that amount of water should be adjudged to the main ditch which can be applied to a beneficial use. The amount of water applied should be with due regard to the rights of other appropriators, and where the first appropriator fails to apply all the water within the limits of his appropriation to a beneficial use, and there is an excess of water which is not applied, the same shall be for the use of the next appropriator in the order of priority, and there should be no appropriation except for an actual beneficial use. The ditch should not be held entitled to appropriate water over and above that which is intended for an immediate beneficial use and water not so diverted and used should belong to the next appropriators in order of priority. As between ditches there should be a pro rata distribution of water based upon the amount each ditch has lawfully appropriated and applied to a beneficial use and not exceeding the limit of each appropriation.

576 And afterwards, to-wit: on the 25th day of November, 1912, there was filed in the office of the clerk of said Supreme court a certain Motion for Rehearing, in the words and figures following, to-wit:

In the Supreme Court of Nebraska.

Number 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee,

VS.

THE TRI-STATE LAND COMPANY and THE FARMERS MUTUAL CANAL COMPANY, Appellants, and THE MINATARE CANAL COMPANY et al., Appellees.

Appeal from Scotts Bluff County.

R. W. Hobart, Judge.

Come now the appellees, The Enterprise Irrigation District, The Mitchell Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company, The Belmont Irrigating Canal and Water Power Company, and each of them, for itself separately and individually, and move the court to vacate and set aside its findings and judgment herein and for a rehearing in said cause for the following reasons, to-wit:

1. The court erred in assuming that it would be detrimental to the irrigation interests of the State of Nebraska to have the alleged adjudications of the State Board of Irrigation declared void.

2. The court erred in its definition of what constitutes an appropriation.

577 3. Under the definition adopted by the court as to what constitutes an appropriation The Farmers' Canal Company had not at the time the State Board of Irrigation made its determination acquired an appropriation for more than a sufficient amount of water to irrigate 5,631.5 acres, that being the greatest amount of land for which said company was "ready and willing to furnish water" (Abstract 101).

4. Because the court erred in holding that the State Board of Irrigation possessed the jurisdiction or power to adjudicate the claims or rights acquired by rival appropriators prior to the passage of the irrigation law of 1895, chapter 69 laws of 1895.

5. Because the rights of appropriation acquired prior to the passage of the act of 1895 were vested property rights and a determination of conflicts in such rights involved the exercise of purely judicial powers, which can only be conferred upon a court, and the State Board of Irrigation, being administrative in character and possessor of quasi judicial powers only, as distinguished from purely judicial powers, had no power or authority to make an adjudication

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ch vested rights that would have the force and effect of a de-
in equity.

Under the construction placed on section 16 of chapter 69
of 1895, the State Board of Irrigation is authorized to prescribe
of procedure and the kind and character of notice to be given
e parties whose interests are to be effected by the action of said
d. This is a delegation of legislative power to said board, which
d render said section of the statute unconstitutional and void.

If it be conceded that the transcript of posted and recorded
es transmitted by the several county clerks to the State Board
irrigation constitutes the claims for adjudication, the court erred
in assuming and holding that a claimant had no right by
voluntary affidavit, pleading or evidence to appear before said
Board and reduce the amount of his said claim.

The statement in the opinion to the effect that "while the
ary filed his opinion on each claim as soon as he had reached a
usion with regard to its validity and priority the Board took
tion in the matter until the investigation was completed, when
rmed the opinions en masse is contrary to the stipulation of
in this case, for it appears that on the seventh day of April,
the Board passed a resolution affirming the opinion of the sec-
on the claim of The Farmers' Canal Company and others
ract 168), on August 10, 1898, more than a year thereafter,
ecretary filed an opinion on the claim of The Belmont Ditch,
ugust 12, 1898, on the Alliance Canal on September 13, 1898
e Chimney Rock Canal, and these latter opinions were affirmed
Board by another resolution on January 2, 1899. (Abstract
71.) This portion of the opinion being based upon a misstate-
of facts, should be corrected and the alleged adjudication of
ate Board declared void, because prematurely entered.

The court erred in holding that the limitation of thirty (30)
within which to issue certificate by the State Board of Irriga-
nder section 21 of the act of 1895 is not mandatory, the pur-
f said certificate being to notify the respective claimants of the
ications actually made and to afford them an opportunity to
therefrom.

The court erred in holding that where a statute authorizes
eeding affecting property rights and does not expressly provide
notice to be given to the property owners, the right to notice
lied, and in failing to hold the provisions of chapter 69 laws
5, providing for a determination of the rights of appropria-
quired prior to the passage of said act, unconstitutional and
void, because said provisions authorize an adjudication or
determination of property rights without notice, and, there-
fore, authorizes a taking of property without due process of
ntrary to the provisions of the Fourteenth Amendment of the
tution of the United States.

The court erred in holding that proper notice was given under
cedure authorized by section 16 of chapter 69, laws of 1895,
ise the various parties interested of the attempted determina-
r adjudications which followed.

12. No notice whatever was given to or served upon The Mitchell Irrigation District, and no appearance was made by said district, or its grantor, before the State Board of Irrigation, (abstract pages 123, 151-152) yet the opinion and judgment of the court in this case holds that said district and its grantors are concluded by the proceedings of the State Board of Irrigation. The effect of said proceedings of said board as construed by the court, if enforced against said Mitchell Irrigation District, is to transfer the rights acquired by said district to the use of the water from the North Platte River during low water seasons from said district to the appellants herein as successors of the Farmers' Canal Company, without notice or an opportunity to be heard, without due process of law, and contrary to the Fourteenth Amendment of the Constitution of the United States.

13. The court erred in holding that the proceedings and determinations of the State Board of Irrigation, as construed by the court, constitute due process of law.

14. The court erred in declining to hold that any jurisdiction acquired by the State Board of Irrigation by virtue of the notice mailed to the various parties in interest had been lost by reason of failure of said Board to continue said proceedings to some definite or particular time for final determination.

15. At the time the alleged hearings were had before the State Board of Irrigation the portion of The Farmers' Canal then
580 constructed would not carry water for more than 30,000 acres of land and only 5,661.5 acres could be reached thereby. (Abstract 100-101.) The capacity of the canal must of necessity be limited to the number of acres susceptible of irrigation therefrom, which was 5,661.5 acres, but, in no event or by no construction, could said canal be said to have a capacity for more than a sufficient quantity of water to irrigate 30,000 acres. The opinion of the secretary of the State Board of Irrigation, afterwards affirmed by the Board, provided that "the appropriation shall not * * * exceed the capacity of said ditch or canal." (Abstract 166.) This proviso had reference to a condition then existing and presumably within the knowledge of all parties affected thereby. In the opinion of the court in this case it is said: "In so far, therefore, as the Board attempted to make a conditional order in such proceeding, its action was unauthorized and nugatory." This language and the judgment based thereon annuls the condition in the finding and alleged adjudication of the State Board, limiting the appropriation to the capacity of the canal. The opinion and judgment of the court in this case arbitrarily annulling said limitation in the opinion of the secretary of the State Board of Irrigation, modifies and changes the judgment or determination of said Board so as to greatly increase the allowance actually made by said Board to The Farmers' Canal Company and so as to correspondingly decrease the appropriations acquired by the several appellees herein. This arbitrary modification of the decree or determination of the State Board of Irrigation by the opinion and judgment of the court in this case deprives said appellees, and each of them, of their property without notice or due

process of law and denies them the equal protection of the law contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

16. The court erred in assuming and holding that to declare invalid the so-called adjudication of the State Board of Irrigation concerning the appropriation effected by means of the Farmers' Canal, in view of the statement of claim in its behalf and the evidence offered in support thereof which were a part of the record before said Board, will be to declare invalid all adjudications of said Board in all cases, and hence be detrimental to the irrigation interests of the State of Nebraska.

17. The court erred in holding that the so-called adjudication of the State Board of Irrigation pertaining to the appropriation effected by means of the Farmers' Canal with the construction placed thereon by this court in the case of Farmers' Canal Co. vs. Frank, and in the opinion in this case, awarding to the owners of said canal more water than the statement of claim and evidence before said Board, being its record, justified, was mere error and not a fatal jurisdictional defect.

18. The judgment of this court in arbitrarily striking out plain, unequivocal and unambiguous conditions in the opinion of the secretary of the State Board of Irrigation on the claim of the Farmers' Canal Company, by the striking out of which the appropriation allowed to said company was increased from 80 second feet of water to 1,142 second feet of water, deprived the appellees herein of their property in the use of said water without notice, without a right to be heard and without due process of law, and contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

19. The court in the opinion in this case failed to distinguish between abandonment and non user. Abandonment depends upon the intention of the appropriator, and the length of time for which he has ceased to use the water is wholly immaterial. Non user does not depend upon the intention of the appropriator. Failure to use the water during the prescriptive period forfeits the right regardless of the intention of the parties. The statute provides that "when the

appropriator, or his successor in interest, ceases to use the water for such (a beneficial) purpose, the right ceases." In the case of Farmers' Canal Company vs. Frank, it was held that non user for a period of ten years forfeited the right of the appropriator. The statute and the construction placed thereon became a rule of property. The holding in this case abrogates the statute and the rule, amounts to judicial legislation, deprives the appellees herein of the protection of the law previously extended them, and amounts to a taking of their property without due process of law and denying them the equal protection of the law contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

20. The doctrine of estoppel has no application whatever in this case, as it is not based upon the facts as they appear in the record

of this case, but upon a pure naked assumption of the court feebly supported by alleged information gleaned from sources outside the record in this case.

21. The arbitrary assertion of the court in this case that appellees are estopped to prevent the appellants from taking and confiscating their property deprives said appellees of their property without due process of law and of the equal protection of the laws, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

22. The holding of this court to effect that the so-called adjudication of the State Board of Irrigation pertaining to the appropriation affected by means of the Farmers' Canal on and prior to the year 1897, awarded to the owners of and consumers under said canal 1,142 second feet of water, being a construction of legislation of the state of Nebraska enacted after rights and appropriations of these appellants severally had become vested, deprives these several appellants of property without due process of law, contrary to the provisions of the 14th Amendment of the Constitution of the United States.

583 23. The opinion and judgment of the court in this case taken as a whole deprives the appellees herein of their property without due process of law contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

MORROW & MORROW,
H. N. HAYNES,
WILCOX & HALLIGAN,
G. J. HUNT,
W. W. WHITE,

Attorneys for Appellees.

Endorsed: Number 17522, In the Supreme Court of Nebraska. The Enterprise Irrigation District, Appellee, vs. The Tri-State Land Company and the Farmers Mutual Canal Company, Appellants, and The Minatare Canal Company et al., Appellees. Appeal from Scotts Bluff County R. W. Hobart, Judge. Motion and Brief for Rehearing. C. C. Flansburg and Wright & Duffie, Attorneys for Appellants. Morrow & Morrow, H. N. Haynes, Wilcox & Halligan, W. W. White and G. J. Hunt, Attorneys for Appellees.

And afterwards, to-wit; on the 31st day of January, 1913, there was rendered by said Supreme Court and entered of record upon the journal thereof, a certain Order in the words and figures following to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913, Jan. 31.

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee,

v.

TRI-STATE LAND CO. et al., Appellants, Impleaded with THE
MITCHELL IRRIGATION DISTRICT et al., Appellees.

Appeal from the District Court of Scotts Bluff County.

This cause coming on to be heard upon motion of appellees for a rehearing herein, was submitted to the court; upon due consideration whereof, the court doth find no probable error in the judgment of this court heretofore entered herein; it is, therefore considered, ordered and adjudged that said motion for rehearing be, and the same hereby is, over-ruled, and a rehearing herein denied.

J. FAWCETT,
Acting Chief Justice.

584 SUPREME COURT, STATE OF NEBRASKA, ss:

I, H. C. Lindsay, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 583, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of The Enterprise Irrigation District v. The Tri-State Land Company, et al., No. 17522, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Lincoln, Nebraska, this October 15, 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska,
By VICTOR SEYMOUR,
Deputy.

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In the Supreme Court of Nebraska.

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee,
vs.

THE TRI-STATE LAND COMPANY and THE FARMERS MUTUAL CANAL
Company, Appellants; The Minatare Canal Company et al., Ap-
pellees.

*Petition for Writ of Error, Assignment of Errors, and Prayer for
Reversal.*

Come now the appellees, The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company, and The Belmont Irrigating Canal and Water Power Company, and considering themselves aggrieved by the final decision of the Supreme Court of Nebraska in rendering judgment against them, and each of them, in the above entitled cause, said appellees hereby pray for a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a bond.

Said appellees assign the following errors in the judgment, record and proceedings of said cause:

586 1. The Supreme Court of Nebraska erred in holding and deciding that Section 16 of Chapter 69, Session Laws of Nebraska, 1895, was valid. The validity of said section was denied and drawn in question by said appellees in said court on the ground that it was repugnant to and in contravention of Article 14, Section 1 of amendments to the Constitution of the United States, in that as construed by said court it provided for a conclusive adjudication and determination of the appropriations of water from the streams of said state and of the relative priorities thereof without prescribing or requiring any notice to parties interested therein. Thereby said appellees as such interested parties were and are deprived of property without due process of law and were and are denied the equal protection of the law.

2. The Supreme Court of Nebraska erred in holding and deciding that Section 19, of Chapter 69, Session Laws of Nebraska, 1895, was valid. The validity of said section was denied and drawn in question by said appellees in said court on the ground that it was repugnant to and in contravention of Article 14, section 1 of Amendments to the Constitution of the United States, in that as construed by said court it provided for a conclusive adjudication and determination of

the appropriations of water from the streams of said State and of the relative priorities thereof without prescribing or requiring any notice to parties interested therein. Thereby said appellees as such interested parties were and are deprived of property without due process of law and were and are denied the equal protection of the laws.

3. The Supreme Court of Nebraska erred in holding and deciding that those provisions of Chapter 69, Session Laws of Nebraska, 1895, which as construed by said court provide for a conclusive adjudication and determination of the appropriations of water of the streams of said state and of the relative priorities thereof, were valid. The validity of said provisions was denied and drawn in question by said appellees in said court on the ground that they are repugnant to and in contravention of Article 14, Section 1 of amendments to the Constitution of the United States, in that neither
587 said chapter nor any other law of said state prescribed or required any notice to parties interested in property rights so to be determined; and particularly because Section 19 of said chapter as construed by said court authorized and required the state Board of Irrigation of Nebraska by its order of record conclusively to determine and establish the several priorities of right to use of water of the North Platte River in said State, the amount of the appropriation of each claimant of water from such stream and the character and kind of use for which each appropriation should be found to have been made, without prescribing or requiring any notice to parties interested therein and without affording any opportunity to such parties, including said appellees, to be heard by or before said board. Thereby said appellees were and are deprived of property without due process of law and were and are denied the equal protection of the laws.

4. The Supreme Court of Nebraska erred in holding and deciding that the resolution and order of the State Board of Irrigation made April 7, 1897, affirming an earlier opinion of its secretary, was a valid, binding and conclusive determination as against said appellees that The Farmers Canal Company had a completed vested appropriation from the North Platte River to the extent of 1142-6/7 cubic feet of water per second of time, of earlier date than the respective appropriations of appellees. The validity of all said proceedings was denied and drawn in question by said appellees in said court on the ground that they were repugnant to and in contravention of Article 14, Section 1, of Amendments to the Constitution of the United States, for the reason that no notice was served or information in any manner given to appellees, their respective grantors, predecessors in interest, or any party adversely interested, of

588 (a) said company having made a claim for a perfected appropriation or priority in excess of 29 second feet of water—the maximum amount then and for many years prior thereto diverted into said canal; (b) said secretary's opinion; (c) said order or resolution of said Board; (d) the amount of said earlier priority awarded to said Farmers Canal Company.

By virtue of the premises, said appellees by the state of Nebraska

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were and are deprived of property without due process of law and denied the equal protection of the laws.

5. The Supreme Court of Nebraska erred in holding and deciding that the opinion of the Secretary of the State Board of Irrigation and the resolution of said Board, affirming said opinion, which said Court construed as a conclusive adjudication, determination and award to the Farmers Canal Company of an appropriation of 1142-6/7 second feet of water, with a priority senior to the respective appropriations of appellees, were valid and conclusive as against said appellees. The validity and effect of said opinion and resolution, as construed by said Court, was denied and drawn in question by appellees on the ground that they were repugnant to Article 14, Section 1, of Amendments to the Constitution of the United States, and in contravention thereof, in that they deprived appellees of their property without due process of law and denied to them the equal protection of the laws for the following reasons:

(a) The provisions of Chapter 69, Session Laws of Nebraska, 1895, under which alone any authority of said Secretary or Board is claimed to determine or adjudicate the property rights involved, do not provide for or require any notice to parties whose property rights and interests are to be *effect*.

(b) The rules of the State Board of Irrigation in force at the time said Secretary rendered said opinion and said Board passed said resolution did not provide for any notice of any opinion rendered, or to be rendered by said Secretary, to any appropriator other than the appropriator whose claim was allowed by such
539 opinion, nor did said rules provide for any notice whatever to interested parties of the time or place that said Board would determine the rights or relative priorities of appropriation of claims to water from the same stream.

(c) The notice of date July 5, 1896, mailed to the parties herein, or to their respective grantors, wholly failed to advise said parties when or where the rights of appropriation of the respective parties or the relative priorities thereof would be determined, or that the same would ever be determined; it was therefore, insufficient to authorize any adjudication or determination as against said appellees of the rights acquired by the Farmers Canal Company.

(d) No appellee, or its grantor, had any notice or information of the time that the Secretary of the State Board of Irrigation would render an opinion on the claim of said Farmers Canal Company, or that any such opinion had been rendered, or of the time or place that said Board would determine the relative priority of the appropriation of said company, or of the fact that said opinion had been affirmed by a resolution or order of said Board until several years thereafter, when it was too late to take an appeal therefrom.

6. The opinion and judgment of the Supreme Court of Nebraska in said case is repugnant to the Fourteenth Amendment of the Constitution of the United States for the following reasons, viz:

(a) The opinion of the Secretary of the State Board of Irrigation relative to the appropriation of The Farmers Canal Company under

which appellants in said court deraign title contains the following limitations and conditions:

"The amount of the appropriation shall not exceed the capacity of said ditch or canal nor the least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry, and further said appropriation under any circumstances shall be limited to 1/70 of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904."

(b) The stipulation of facts shows that the amount of water applied before September 1, 1904, was less than 29 second feet and that the capacity of that part of the canal or ditch in question constructed on or prior to September 1, 1904, did not exceed 428 second feet.

(c) Applying said limitation to facts admitted in this case, the water allowed to The Farmers Canal Company by said Secretary's opinion is limited to less than 29 second feet. By the opinion and judgment of said court, said limitation was held void and said opinion construed as an absolute and unqualified allowance of an appropriation of 1142-6/7 second feet of water, with a priority dating from September 16, 1887, and the appropriation allowed to said company by said Board was thereby increased from 29 second feet to 1142-6/7 second feet, which correspondingly decreased the amount and value of the appropriations of the appellees, which were all held to be junior to the appropriation of said Farmers Canal Company, and said appellees were thereby deprived of their property without notice or hearing, or an opportunity to be heard, and without due process of law, and were denied the equal protection of the laws.

7. The Supreme Court of Nebraska erred in holding and deciding that the limitations and provisions contained in the opinion of the Secretary of the State Board of Irrigation, affirmed by said Board, whereby the quantity of water awarded to The Farmers' Canal Company was limited to the capacity of its ditch and to 1/70 of one cubic foot of water per second of time for each acre of land to which water should be applied on or prior to September 1, 1904, should be excised therefrom as invalid, and what was then left of said affirmed opinion should be held valid and enforceable as awarding an absolute grant of an appropriation of 1142-6/7 second feet of water to The Farmers Canal Company, with a priority senior to the respective appropriations of appellees, contrary to the manifest intention of said Secretary and said Board in rendering and affirming said opinion. Thereby appellees were and are deprived of their property in their respective later or junior appropriations without due process of law and were and are denied the equal protection of the laws contrary to the provisions of Article 14, Section 1 of Amendments to the Constitution of the United States.

8. The judgment and decision of the Supreme Court of Nebraska to the effect that said appellees were and are estopped to deny the

claims of appellants in said court to an absolute completed appropriation of water amounting to 1142-6/7 second feet with priority dating from September 16, 1887, deprives said appellees of their property in their respective appropriations of water from the North Platte River without due process of law and denies to them the equal protection of the laws contrary to Article 14, Section 1 of Amendments to the Constitution of the United States.

9. The judgment and decision of the Supreme Court of Nebraska holding that if the claim of said appellants in said court to a completed appropriation of 1142-6/7 second feet of water with priority dating from September 16, 1887, were in fact without merit and invalid as asserted by appellees, still the latter are estopped to controvert said claim because of failure to object to expenditures of money by said appellants in late construction work on their canal and irrigation works, deprives said appellees of their property in their respective appropriations without due process of law and denies to them the equal protection of the laws contrary to Article 14, Section 1 of Amendments to the Constitution of the United States for the following reasons, viz:

(a) The assumption of said court that appellees in fact acquiesced in the claims of said appellants and in their expenditure of money in reliance thereon, is not supported by any evidence whatever, but is contrary to the pleadings and the stipulation of facts.

(b) The improvements and expenditures made by said appellant, The Tri-State Land Company were entirely consistent with an intent to acquire an appropriation of water of priority date junior to the respective priorities of the appellees.

(c) Before appellant, The Tri-State Land Company, had commenced said expenditure of money, appellees had already expended their money and had been using the water under claims of priorities senior to that of appellants, all of which was known to said appellants, so that appellant, the Tri-State Land Company, was not and could not have been deceived or misled to its prejudice by the failure of appellees to institute litigation against it to prevent it from expending money to enlarge its canal.

10. If the Supreme Court of Nebraska did not err in holding and deciding that appellants in said Court and their grantor once had an adjudicated and completed appropriation of 1142-6/7 second feet of water earlier than the appropriations of said several appellees from the same stream, said Court did err in holding that any portion of said senior appropriation in excess of 29 second feet had not been lost by continuous non-user for more than ten consecutive years, pursuant to Section 18, Session Laws of Nebraska, 1895, and the settled rule of construction of said statute, by virtue whereof said appellees severally had vested rights of property to have their respective appropriations from said river recognized and enforced as junior and subordinate only to said 29 second feet. The holding and decision of the Supreme Court of Nebraska to the contrary was challenged and drawn in question by said appellees in said court on the ground that thereby they, and each of them, were deprived of their property without due process of law and denied the equal

protection of the laws, in contravention of Article 14, Section 1, of Amendments of the Constitution of the United States.

For which errors said appellees, The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, the Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company, and The Belmont Irrigating Canal and Water Power Company, and each of them, pray that the said judgment of the Supreme Court of Nebraska, dated October 18, 1912, and the final judgment of said court in said cause rendered January 31, 1913, overruling the Motion for a Re-Hearing be reversed and a judgment rendered in favor of the said appellees, and for costs.

THOMAS M. MORROW,
HARRY N. HAYNES,

Attorneys for Above-named Appellees.

594 STATE OF NEBRASKA,

Supreme Court, ss:

Let the Writ of Error issue upon the execution of a bond by The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company and The Belmont Irrigating Canal and Water Power Company, to The Tri-State Land Company and The Farmers Mutual Canal Company in the sum of Two Thousand Dollars (\$2,000.00).

Dated October 15th, 1914.

M. B. REESE,

Chief Justice Supreme Court of Nebraska.

[Endorsed:] Supreme Court of Nebraska. Filed Oct. 15, 1914.

H. C. Lindsay, Clerk.

595 [Endorsed:] No. 17522. In the Supreme Court of Nebraska. The Enterprise Irrigation District, Appel-ee, vs. The Tri-State Land Company and The Farmers Mutual Canal Company, Appellants. The Minatare Canal Company et al., Appellees. Petition for Writ of Error, Etc. Supreme Court of Nebraska. Filed Oct. 15, 1914. H. C. Lindsay, Clerk.

596

In the Supreme Court of Nebraska.

No. 17522.

THE ENTERPRISE IRRIGATION DISTRICT, Appellee,

vs.

THE TRI-STATE LAND COMPANY and THE FARMERS MUTUAL CANAL Company, Appellants; The Minatare Canal Company et al., Appellees.

Bond.

Know all men by these presents, that we, The Enterprise Irrigation District, the Ramshorn Ditch Company, The Gering Irrigation District, the Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company and The Belmont Irrigating Canal and Water Power Company, as principals, and United States Fidelity & Guaranty Company as Surety, are held and firmly bound unto The Tri-State Land Company and The Farmers Mutual Canal Company in the sum of Two Thousand Dollars (\$2,000.00), to be paid to the said Tri-State Land Company and Farmers Mutual Canal Company, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals, and dated this 9th day of October, A. D. 1914.

Whereas, the above named appellees, The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual
597 Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Chimney Rock Irrigation Canal and Water Power Company, the Winters Creek Irrigation Company, The Browns Creek Irrigation Company and The Belmont Irrigation Canal and Water Power Company, seek to prosecute their writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Nebraska.

Now, therefore, the condition of this obligation is such, that if the above named appellees, The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns

Creek Irrigation Company and The Belmont Irrigating Canal and Water Power Company, shall prosecute their said writ of error to effect, and answer all costs and damages that may be adjudged if they shall fail to make good their plea, then this obligation to be void, otherwise to remain in full force and effect.

[SEAL.] THE ENTERPRISE IRRIGATION DISTRICT,

By C. R. MILLS, *President*.

Attest:

B. J. SEGER, *Secretary*.

[SEAL.] THE RAMSHORN DITCH COMPANY,

By GEORGE H. GARRARD, *President*.

Attest:

J. T. LOGAN, *Secretary*.

598 [SEAL.] THE GERING IRRIGATION DISTRICT,
By J. P. WESTERVELT, *President*.

Attest:

H. C. BARTON, *Secretary*.

[SEAL.] THE CENTRAL IRRIGATION DISTRICT,
By R. C. CAMPBELL, *President*.

Attest:

H. C. BARTON, *Secretary*.

[SEAL.] THE CASTLE ROCK IRRIGATION CANAL
AND WATER POWER COMPANY,
By C. C. FRANKLIN, *President*.

Attest:

A. A. JEFFORDS, *Secretary*.

[SEAL.] THE MINATARE MUTUAL CANAL AND
WATER POWER COMPANY,
By C. H. FLOWER, *President*.

Attest:

F. H. JOHNSON, *Secretary*.

[SEAL.] THE STEAMBOAT DITCH COMPANY,
By ROBERT M. LEE, *President*.

Attest:

G. M. CRABILL, *Secretary*.

[SEAL.] THE NINE MILE IRRIGATION DISTRICT,
By J. H. DAGGY, *President*.

Attest:

E. F. KELLEY, *Secretary*.

599 [SEAL.] THE CHIMNEY ROCK IRRIGATION
CANAL AND WATER POWER COMPANY,
By R. F. DURNAL, *President*.

Attest:

R. J. KRUSE,
By H. E. RANDALL,
Acting Secretary.

[SEAL.] THE WINTERS CREEK IRRIGATION COMPANY,

By A. V. OFFICE, *President*.
S.

Attest:

T. F. KENNEDY, *Secretary*.

[SEAL.] THE BROWNS CREEK IRRIGATION COMPANY,

By CHAS. A. TOLLE, *President*.

Attest:

JOHN D. HAGERTY, *Secretary*.

[SEAL.] THE BELMONT IRRIGATION CANAL AND WATER POWER COMPANY,

By CHAS. A. SWEET, *President*.

Attest:

IRVING ALLISON, *Secretary*.

[SEAL.] THE ALLIANCE IRRIGATING CANAL AND WATER POWER COMPANY,

By S. H. OSBORNE, *President*.

Attest:

R. E. O'NEAL, *Secretary, Principals*.

[SEAL.] THE UNITED STATES FIDELITY & GUARANTY CO.,

By J. C. MORROW,
Attorney, Surety.

Endorsed: No. 17522. In the Supreme Court of Nebraska. The Enterprise Irrigation District, Appellee, vs. The Tri-State Land Company and The Farmers Mutual Canal Company, Appellants. The Minatare Canal Company et al., Appellees. Bond. Approved this 15th day of October, 1914. M. B. Reese, Chief Justice of the Supreme Court of the State of Nebraska. Supreme Court of Nebraska. Filed Oct. 15, 1914. H. C. Lindsay, Clerk.

600

Writ of Error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Nebraska, *sitting*:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Mina-

tare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company, and The Belmont Irrigating Canal and Water Power Company, as appellees in said court, and The Tri-State Land Company and The Farmers Mutual Canal Company, appellants in said court, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; and it is alleged that a manifest error hath happened, to the great damage of the said The Enterprise Irrigation District, The

601 The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company, and The Belmont Irrigating Canal and Water Power Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, the fifteenth day of October, in the year of our Lord one thousand nine hundred fourteen.

[Seal United States District Court, District of Nebraska, Lincoln Division.]

R. C. HOYT,

Clerk District Court United States, District of Nebraska,

By J. H. McCLARG, *Deputy.*

Allowed October 15, 1914.

M. B. REESE,

Chief Justice Supreme Court of Nebraska.

[Endorsed:] 17522. The Enterprise Irrigation District v. Tri-State Land Co. Writ of error. Supreme Court of Nebraska. Filed Oct. 15, 1914. H. C. Lindsay, Clerk.

602 SUPREME COURT, STATE OF NEBRASKA, ss:

I, H. C. Lindsay, clerk of the said court, do hereby certify that there was lodged with me as such clerk on October 15, 1914, in the case of The Enterprise Irrigation District v. The Tri-State Land Company et al., No. 17522:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth, one for each defendant in error.
3. Two copies of the petition for writ, assignments of error and prayer for reversal, as herein set forth, one for each of the defendants in error.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Lincoln, Nebraska, this 15th day of October, 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

603

Citation.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to The Tri-State Land Company and The Farmers Mutual Canal Company, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Nebraska, wherein The Enterprise Irrigation District, The Ramshorn Ditch Company, The Gering Irrigation District, The Central Irrigation District, The Castle Rock Irrigation Canal and Water Power Company, The Minatare Mutual Canal and Water Power Company, The Steamboat Ditch Company, The Nine Mile Irrigation District, The Alliance Irrigating Canal and Water Power Company, The Chimney Rock Irrigation Canal and Water Power Company, The Winters Creek Irrigation Company, The Browns Creek Irrigation Company, and The Belmont Irrigating Canal and Water Power Company are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the

said plaintiffs in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Nebraska, this 15th day of October, 1914.

M. B. REESE,

Chief Justice Supreme Court of Nebraska.

Attest:

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,

Clerk Supreme Court of Nebraska,

By VICTOR SEYMOUR, *Deputy.*

[Endorsed:] 17522. The Enterprise Irrigation District v. Tri-State Land Company et al. Citation.

604 STATE OF NEBRASKA,
Lancaster County, ss:

Frank W. Coleman, of lawful age, being first duly sworn, on oath deposes and says:

I am the duly appointed, qualified and acting bailiff of the supreme court of the State of Nebraska. I was duly authorized and deputized by Hon. Manoah B. Reese, Chief Justice of the Supreme Court of the State of Nebraska, to serve upon the defendants in error the citation hereto attached. I served the same by delivering personally to Claude C. Flansburg, attorney for The Tri-State Land Company and for The Farmers Mutual Canal Company, defendants in error, two true and certified copies of said citation with all endorsements thereon, at Lincoln, Nebraska, October 15, 1914, at 1.20 P. M.

Witness my hand this October 15, 1914.

FRANK W. COLEMAN.

Sworn to and subscribed to before me this October 15, 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,

Clerk Supreme Court, State of Nebraska,

By VICTOR SEYMOUR, *Deputy.*

Mileage, 2 miles at 5c., 10c.; service 2 copies with return, 1.50. \$1.60 paid by plaintiffs in error.

605 UNITED STATES OF AMERICA,
Supreme Court of Nebraska, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

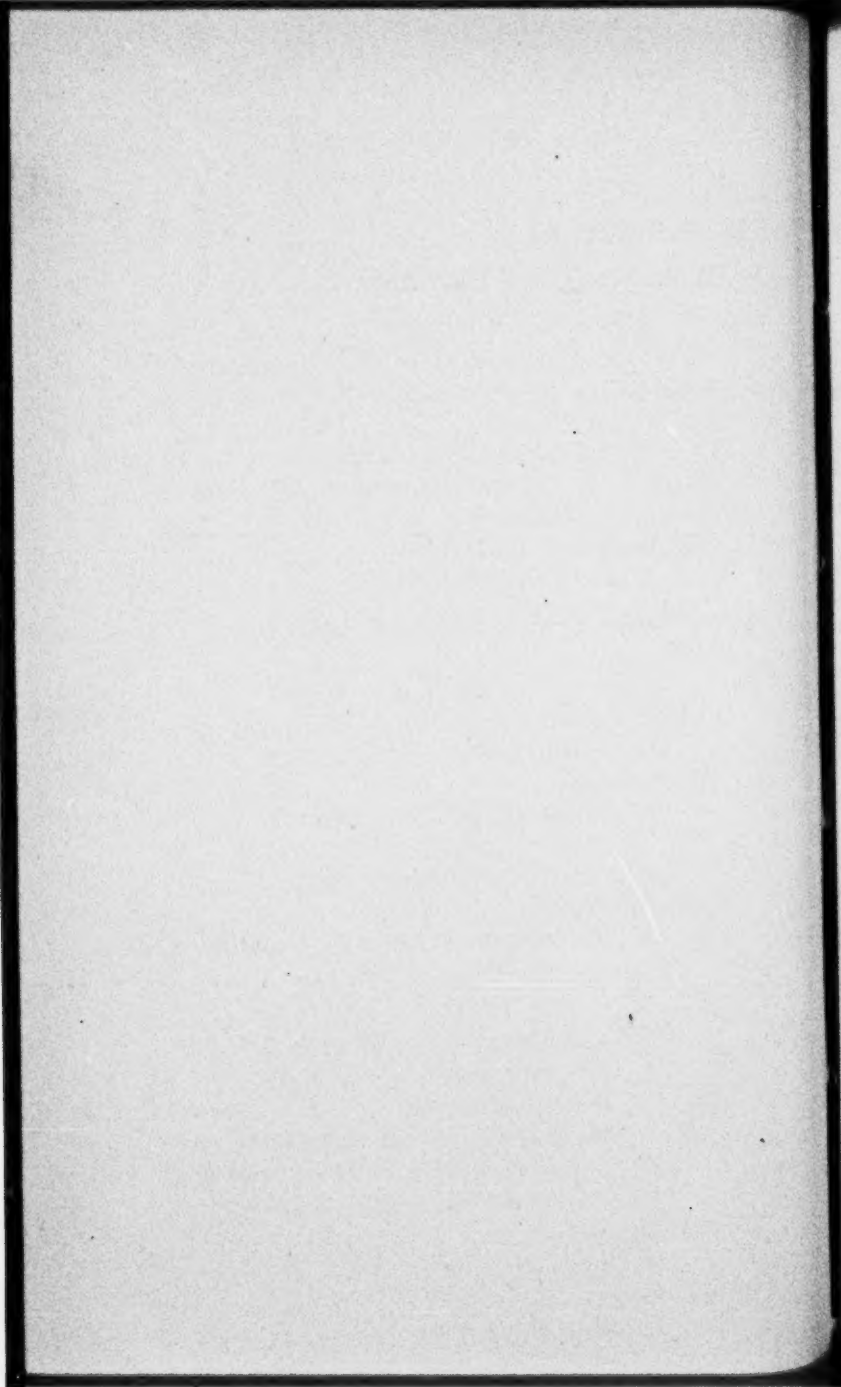
In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Nebraska, in the City of Lincoln, this October 15, 1914.

[Seal Supreme Court of Nebraska.]

H. C. LINDSAY,
Clerk Supreme Court of Nebraska,
By VICTOR SEYMOUR, *Deputy.*

Costs of transcript, \$240.10, paid by Harry N. Haynes for plaintiffs in error.

Endorsed on cover: File No. 24,412. Nebraska Supreme Court. Term No. 270. The Enterprise Irrigation District, The Ramshorn Ditch Company, et al., plaintiffs in error, vs. The Tri-State Land Company and The Farmers Mutual Canal Company. Filed October 22d, 1914. File No. 24,412.



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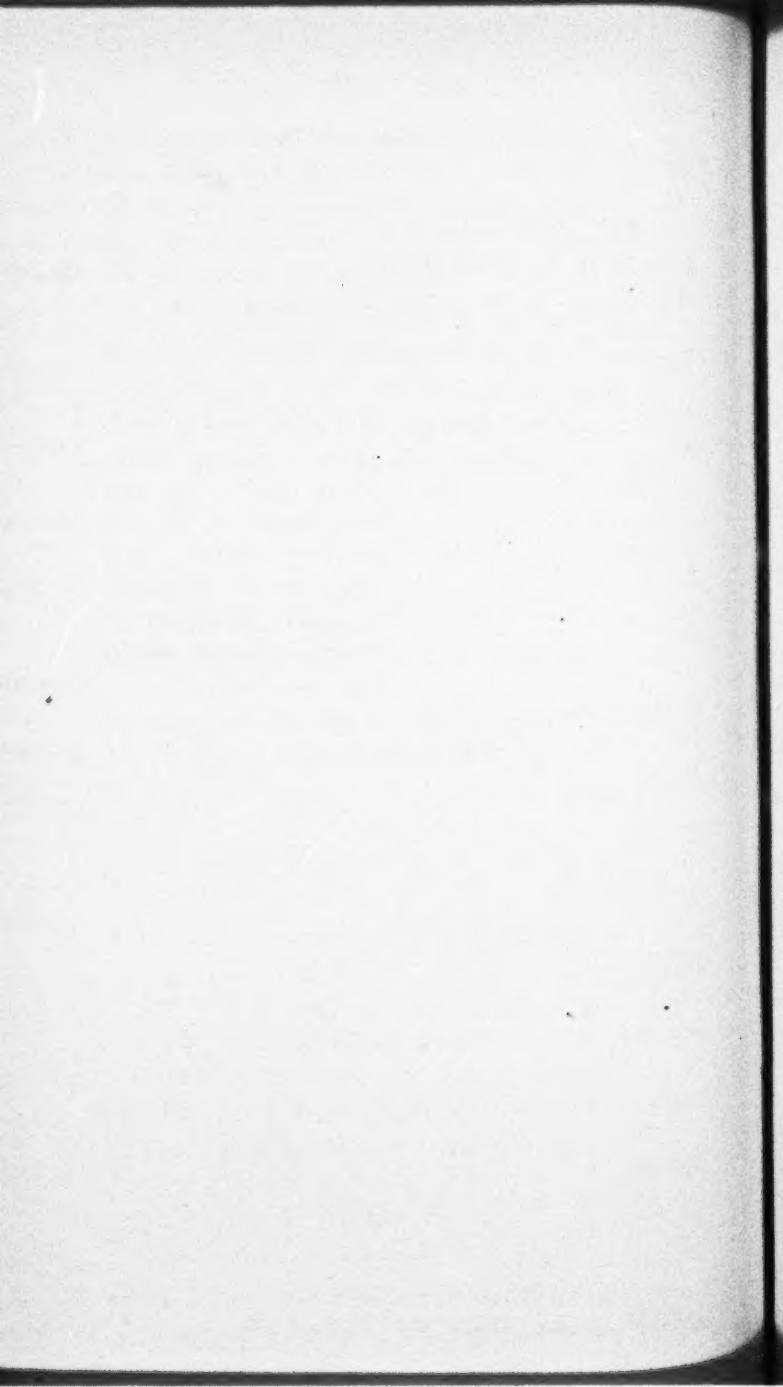
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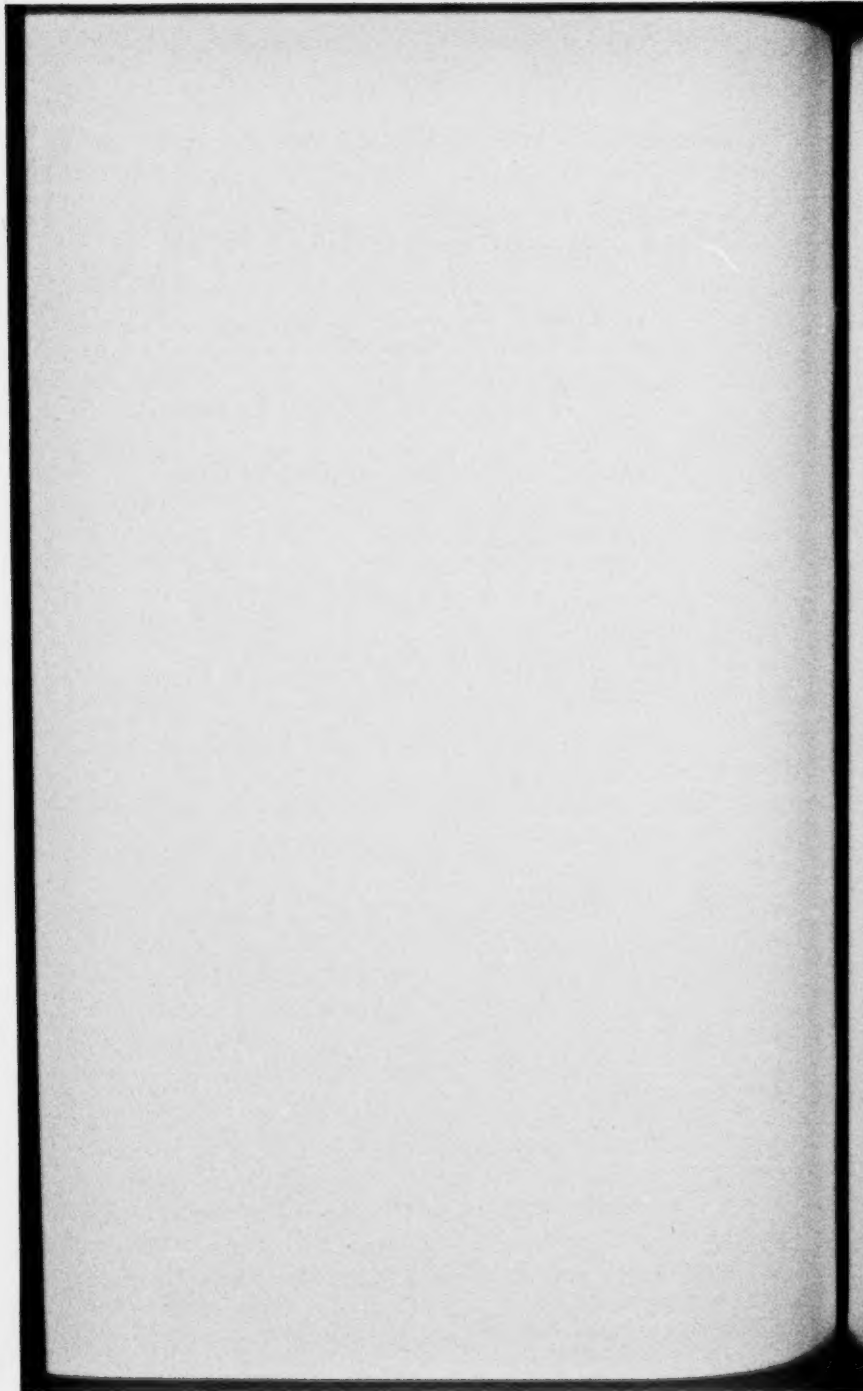
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IN THE
SUPREME COURT
OF THE
UNITED STATES.

OCTOBER TERM, 1915. No. 270.

THE ENTERPRISE IRRIGATION DISTRICT, THE RAMSHORN DITCH COMPANY, THE GERING IRRIGATION DISTRICT, THE CENTRAL IRRIGATION DISTRICT, THE CASTLE ROCK IRRIGATION CANAL AND WATER POWER COMPANY, THE MINATARE MUTUAL CANAL AND WATER POWER COMPANY, THE STEAMBOAT DITCH COMPANY, THE NINE MILE IRRIGATION DISTRICT, THE ALLIANCE IRRIGATING CANAL AND WATER POWER COMPANY, THE CHIMNEY ROCK IRRIGATION CANAL AND WATER POWER COMPANY, THE WINTERS CREEK IRRIGATION COMPANY, THE BROWNS CREEK IRRIGATION COMPANY, and THE BELMONT IRRIGATING CANAL AND WATER POWER COMPANY,

Plaintiffs in Error,

vs.

THE TRI-STATE LAND COMPANY and THE FARMERS MUTUAL CANAL COMPANY,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

INTRODUCTORY.

This case reaches this court on error to the supreme court of the state of Nebraska. Its subject matter pertains to the relative dates and amounts of irrigation appropriations from the North Platte river in that state. The litigation began in the district court of Scotsbluff county, Nebraska. The decree of that court on the plead-

ings and stipulated facts was satisfactory to the present plaintiffs in error. On appeal taken by the present defendants in error, the supreme court of Nebraska reversed said decree and entered final judgment dismissing the case. The jurisdiction of this court is invoked on the ground that plaintiffs in error were denied the equal protection of the laws and deprived of property without due process of law, contrary to the provisions of the 14th amendment to the United States constitution.

STATEMENT OF CASE.

The merits of this controversy hinge upon the one question: How many cubic feet of water per second of time (hereafter termed second-feet) can defendants in error rightfully divert into their Farmers or Tri-State canal as of priority date earlier than the respective appropriations of plaintiffs in error? Herein we disregard fractions of a second-foot.

Plaintiffs in error (severally owning other canals) maintain, the early priority of said Farmers canal antedating all of theirs should not exceed 28 second-feet as determined by the trial court. The supreme court of Nebraska sustained the claim of defendants in error to an appropriation of 1,142 second-feet of earliest priority date. Inasmuch as the usual flow of water in the North Platte for several months each year is much less than said quantity, the remaining canal owners by the decision, if unreversed, will ever hereafter be deprived of needed water, whereby conditions existing from ten to twenty years will be changed to their injury. The controversy involves over 1,100 second-feet of water, the use of which for irrigation is worth more than \$2,000 per second-foot.

The decision of the supreme court of Nebraska here challenged is based on certain proceedings and an "adjudication" in 1897 by the state board of irrigation as subsequently construed in 1904 by said court in another case. Said so-called adjudication was treated as *res judicata*

against plaintiffs in error. They maintain, said asserted estoppel of record results from proceedings wherein fundamental requirements of due process of law were ignored, because no notice was provided by statute, rules or regulations of said board providing for notice were not followed, so they had no opportunity to be heard.

An agreed statement of facts takes the place of all evidence. The amounts and dates of appropriations of each plaintiff in error as determined by the trial court are not disputed. Hence, in our synopsis of the pleadings, we present the gist only of the amended and supplemental petition of the original plaintiff, the answer and cross-petition of one defendant, typical of all pleadings of the remaining plaintiffs in error, the answer of The Tri-State Land Company, in which its co-defendant in error joined, and the replication to said answer.

For same reason, in our synopsis of the stipulation of facts, we omit details about all canals except that of defendants in error and limit said statement chiefly to the following: (a) Matters pertaining to the Farmers or Tri-State canal; (b) those relating to the so-called adjudications by the state board of irrigation, its procedure, etc.; (c) those throwing light on the claimed estoppel of record and subjects ancillary thereto, though not independent thereof.

It is conceded that before 1909, less than 29 second-feet of water had been diverted into the Farmers or Tri-State canal. Plaintiffs in error had diverted into their respective canals and used for irrigation (in some instances for nearly 20 years) amounts of water severally adjudged to them by the trial court.

The asserted claim of defendants in error to a prior appropriation exceeding 28 second-feet and even for an amount greater than the river flow to its headgate after July 1 of each year conflicting with said admitted facts, is based on:

(a) An *ex parte* conditional opinion of the secretary of the state board of irrigation of Nebraska concerning said Farmers canal, rendered and filed in his office January 7, 1897.

(b) An affirmance of said opinion (with sundry others) by said board on April 7, 1897.

(c) The decision of the supreme court of Nebraska on June 9, 1904, in Farmers Canal Co. vs. Frank, 72 Neb., 136, to which no plaintiff was or could have been a party, wherein said Frank was denied a permit to enlarge and extend said canal except as subordinate to an earlier appropriation of 1,142 second-feet, asserted by its then owners on strength of said secretary's opinion so affirmed by said board. In that decision said court excised from said "opinion" the conditions therein stated and thereby radically changed its meaning.

(d) A decision of the district court in said Frank case, November 18, 1904, on mandate of said supreme court.

The vital issue in this court is whether the judgment of the supreme court of Nebraska under review sustaining this plea of *res judicata*, in view of the fact that plaintiffs in error were not parties or privies to said proceedings and had no opportunity to be heard therein, conforms to the requirements of Sec. 1 of the 14th amendment to the United States constitution providing that no state shall deprive any person or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. Our contention is that said secretary and board were never clothed with judicial power to determine controverted and adversary claims. Irrespective thereof, said "opinion" and "resolution" were the result of *ex parte* and *in camera* proceedings, not such as were called for by general rules presented in advance by said state board. Had said prescribed procedure been followed, plaintiffs in error might have been afforded some semblance of opportunity to be heard. As it was, they had

none. Moreover, said board did not comply with the Nebraska statute intended to afford to one adversely affected by its decision, notice thereof to enable him to appeal to the courts within sixty days after its rendition.

SYNOPSIS OF PLEADINGS AS FINALLY AMENDED.

AMENDED AND SUPPLEMENTAL PETITION of The Enterprise Irrigation District as plaintiff was filed in trial court October 5, 1910, making the remaining litigants defendants. Its first ten paragraphs are not disputed; in brief they state:

The Enterprise Ditch Company before March 28, 1889, surveyed a canal easterly from a stated point on north bank of the North Platte in said Scottsbluff county. On said day it there posted and promptly filed for record notice of its intention to divert water to fill said proposed ditch to irrigate lands thereunder. Soon thereafter it began construction work on its canal which was completed with diligence. Before April 11, 1895, said canal was completed of capacity to conduct to irrigated lands thereunder more than 173 second-feet of water. In July, 1890, said company diverted water for irrigation. The irrigated area thereunder increased yearly until 1895, when and thenceforward 12,160 acres (described in detail), requiring 173 second-feet of water, had been so reclaimed. Said Enterprise Ditch Company on March 17, 1900, conveyed to plaintiff district, duly organized to comprise all said irrigated area, said Enterprise canal and the appropriation of water effected thereby. Since that time plaintiff has been its owner, impressed with the duty to its land owners to conduct said appropriated water to their lands each irrigating season. Therefore, plaintiff owns the right to appropriate and divert from said river of priority date March 28, 1889, 173 second-feet of water continually each irrigating season.

Printed Record, pages 5 to 10.

In May, 1895, the county clerk of said county filed with the secretary of the state board of irrigation of Nebraska transcripts of notices of claimed appropriations recorded in his office. Thereafter said secretary forwarded to plaintiff's grantor a blank form of "claim for the waters of the state of Nebraska" to enable it to give called for information. Said form duly filled out, signed and verified was filed with said secretary October 15, 1895. Said secretary on July 17, 1896, made certain inquiries and took certain evidence regarding said claim. On January 7, 1897, he rendered an opinion thereon, wherein he found and determined the Enterprise canal to be of size as stated and used to irrigate the land claimed, with appropriation of 173 second-feet, of priority date March 28, 1889. Said opinion contained no finding about any other appropriation or claim, or concerning relative priorities. Neither plaintiff nor its grantor had notice that any prior rights were claimed by others.

Sundry other claimants of completed appropriations from said river had filed their respective statements of claim before April 7, 1897. Said secretary after making *ex parte* inquiry and taking *ex parte* evidence on each claim rendered a separate opinion thereon. No claimant had any notice of the claims of others or of said opinions on any claims except its own. On April 7, 1897, said state board of irrigation without notice to the several claimants and without knowledge of plaintiff's grantor, passed and had spread on its records a resolution affirming all said opinions of its secretary.

Neither plaintiff nor its grantor had notice of said various opinions concerning claims of others or of the passage of said general affirming resolution of said board, or knowledge thereof until shortly before beginning of this suit. Neither had information that said state board intended to do anything more than to record in its office the right claimed by said grantor of plaintiff.

Each month of each irrigation season before 1909, sufficient water has come down said river channel to the headgate of said Enterprise canal to supply it with all water needed to irrigate all land thereunder. Said land was desert. Because of irrigation it has reached a high state of cultivation in valuable crops. To continue such irrigation is essential to preserve from ruin crops, trees, shrubbery and orchards. Otherwise, said land, including now prosperous homes, will become practically valueless.

Printed Record, pages 10 to 12.

The Farmers Canal Company, incorporated in August, 1887, began to construct an irrigation canal in the spring of 1889, to divert water from said river at point stated about six miles above plaintiff's headgate. It continued work until some time in 1890, when its Farmers canal was extended about 10 miles east of its diverting point and work thereon ceased. Then not more than 1,500 acres were susceptible of irrigation therefrom; its then capacity did not suffice to carry water for more than 1,200 acres. Said company did not resume work until the spring of 1892, when it sought to enlarge and extend its canal until the summer of 1893, when work again ceased, with the ditch about 15 miles long, of capacity to supply enough water for 3,000 acres, but having only 2,000 irrigable acres thereunder. Only 2,000 acres were irrigated therefrom before 1909. Said Farmers Canal Company never resumed work on said canal, which with all property and franchises was sold December 23, 1901, under foreclosure of an incumbrance of one Roberts Walker. On October 20, 1904, he conveyed it to defendant, the Tri-State Land Company (par. 16).

The next construction work on said Farmers canal began in December, 1906, when said Tri-State Land Company began to enlarge and extend it; from that date until the fall of 1907, it was enlarged at its headgate and for a short distance below to bottom-width of 90 feet and depth of 11 feet. It was then extended to about 40 miles from its headgate to make it capable of irrigating about 40,000 acres.

Said defendant then conveyed said canal with its water rights, appropriations and franchises to its co-defendant, The Farmers Mutual Canal Company. In consideration thereof, said vendor received all the capital stock of said vendee and still owns or controls the majority thereof. Said two defendants are now preparing to extend said canal 30 or 40 miles further with intent to divert water from said river to irrigate 80,000 acres (par. 17).

Printed Record, pages 12 to 14.

On July 17, 1896, the secretary of said state board of irrigation made certain inquiries and took certain evidence relative to the appropriation claimed by said Farmers Canal Company. On September 19, 1896, said company filed with said secretary its claim for an appropriation of 275,000 miner's inches to irrigate 70,000 acres described.

January 9, 1897, said secretary rendered and recorded in his office an opinion on said claim finding and determining, (1) said Farmers Canal heads on north bank of said river at place stated; (2) it is about 81 miles long, covers and reclaims about 80,000 acres of land (described); (3) its priority of appropriation dates from September 16, 1887. Said opinion states said claim is allowed subject to following limitations and conditions, viz.:

First. The water appropriated shall be used for irrigation.

Second. The time to complete application to said use shall extend to September 1, 1904.

Third. The amount of appropriation shall not exceed (1) 1,142 second-feet, (2) the capacity of said ditch, (3) the lowest amount experience may show is needed to produce crops under good husbandry. It shall be limited to one-seventieth of one second-foot for each acre to which water has been actually usefully applied by September 1, 1904.

Said opinion contained no finding concerning priorities of other appropriations (par. 18).

Printed Record, pages 14 and 15.

April 7, 1897, said board by resolution affirmed said opinion and others of its secretary (par. 19).

At dates of said opinion and of said affirming resolution, said Farmers canal was only of the length stated *supra*. The claim filed by its then owner showed on its face that it was then only 19 miles long; that it had not diverted or used water to irrigate more than 2,000 acres requiring 28 second-feet (par. 20).

Plaintiff's grantor had no notice of either the filing of said claim by the Farmers Canal Company, said hearing or inquiry thereon, said opinion, or said affirming resolution; nor did plaintiff or its grantor acquire any knowledge of said matters until several years after their occurrence. No copy either of said opinion or resolution was ever delivered to plaintiff or its grantor, or filed in the office of the county clerk of Scottsbluff county. No certificate of said board containing the name or postoffice address of said company, the priority number, date or amount of its alleged appropriation, or of any appropriations antedating plaintiff's, or any like information was ever transmitted to any county clerk. No opportunity was given plaintiff's grantor to appear before state board or its secretary to show the facts concerning said Farmers canal (par. 21).

Neither said Farmers Canal Company nor any of its grantees applied to beneficial use more than 28 second-feet of water before 1909. Notwithstanding this fact, defendants, the Tri-State Land Company and the Farmers Canal Company, claim and assert the right to divert continuously each irrigating season from said river into said Farmers or Tri-State canal, 1,142 second-feet of water as of priority date, September 16, 1887, and as superior to the appropriation of plaintiff. They have threatened to construct and maintain a dam across said river just below the headgate of their said canal and above plaintiff's Enterprise canal, to intercept and divert said quantity into the former (par. 22).

During the greater part of the irrigating season of 1910, said two defendants so diverted several hundred second-feet of water. By so doing they reduced the volume in said river at plaintiff's headgate much below what plaintiff was entitled and needed to divert. Notwithstanding said state board of irrigation had no jurisdiction to adjudicate the relative appropriation rights acquired before the passage of the law creating said board, and though no adjudication in fact was made concerning said relative rights, yet because of said opinion of its secretary, and the passing of said sweeping affirming resolution in 1897, said board in its administrative control of said river caused the headgate of plaintiff to be closed in 1910 so as to prevent needed water to flow into its Enterprise canal, when allowing said two defendants to divert as much water as they desired up to 1,142 second-feet (par. 23).

Because of said opinion and resolution to give to the owners of said Tri-State or Farmers canal a priority over plaintiff in excess of 28 second-feet of water, will deprive plaintiff and its water consumers of property of great value without hearing and hence without due process of law. Said opinion and resolution clouds plaintiff's title to its said appropriation. Unless said cloud is removed by judicial decree said state board hereafter, as in 1910, will refuse to grant to plaintiff or its water consumers any relief against said unlawful diversion, and will permit said two defendants to divert all water of said stream during times of scarcity (par. 24).

Printed Record, pages 16 and 17.

Said North Platte river derives its water supply from various streams heading in the mountains of Colorado and Wyoming. The amount of water flowing therein greatly varies at different times. In April, May and June, the river flow suffices to supply all canals thus far constructed in Nebraska; during July and August each year, just above the headgates of said canals it ranges from 100 to 2,000 and averages about 875 second-feet; during September and October each year, from 50 to 2,000, averaging about 450 sec-

ond-feet; during each November, from 250 to 2,000, averaging about 900 second-feet. Said average supply during July to November, inclusive, for several years last past, has been, and in future will be, much less than said two defendants claim the prior right to divert as aforesaid. If said claimed right be not restricted, plaintiff and its water consumers will be wholly deprived of water for irrigation during July to November of each year as practiced for more than 20 years, to their irreparable damage and injury (par. 25).

Said claim of said Tri-State Land Company and Farmers Mutual Canal Company is unfounded in fact; they have not acquired the right to divert more than 28 second-feet of priority date earlier than that of plaintiff. If by virtue of any proceedings taken by them or their grantors, they ever initiated a right to ripen upon prompt use into an appropriation, said initiated right was lost by non-user and abandonment for more than 10 years. Notwithstanding this, said defendants, unless restrained by this court, will construct a dam across said river at the headgate of said Farmers canal and will divert therein to each irrigating season all water flowing in said river to said land to extent of 1,142 second-feet when obtainable, including the 173 second-feet heretofore appropriated and diverted by plaintiff; thereby they will prevent plaintiff from diverting any water during the greater part of each irrigating season, to its irreparable damage and injury (par. 26).

Printed Record, pages 17 to 19.

Defendant Gering Irrigation District owns an irrigating canal heading on south bank of said river just opposite headgate of said Farmers canal; defendant Ramshorn Ditch Company owns another heading on north bank about three miles below head of said Farmers canal and about three miles above plaintiff's headgate. For several years said defendants have severally diverted water to irrigate land under their several canals, each claiming an appropriation of earlier date than that effected by means of said Farmers canal. Said appropriations are inferior to that of plaintiff (par. 27).

Concerning defendants who, respectively (as detailed), own the Winters Creek, Central, Castle Rock, Minatare, Steamboat, Nine Mile, Brown's Creek, Chimney Rock, and Belmont canals, each has been diverting and appropriating water from said river at headgates below that of plaintiff, some in Scottsbluff, some in Morrill county, Nebraska. Each of said parties claim to have acquired right to appropriate water from said river, some as prior to plaintiff (par. 28).

Printed Record, pages 19 to 21.

Paragraphs 29 and 30 of said pleading state reasons for making the owners of said several canals defendants.

The prayer is for decree, (1) to determine the relative priority dates and the amounts of water appropriated by each party; (2) that plaintiff has acquired an appropriation from said river of 173 second-feet of priority date, March 28, 1889; (3) that said right is prior in time and superior in right to that of any defendant; (4) that said right be quieted as against each defendant; (5) that the cloud cast on plaintiff's title by the opinion of the secretary of the state board of irrigation and said resolution of said board be removed; (6) that the defendants, Farmers Mutual Canal Company, Tri-State Land Company, The Ramshorn Ditch Company, the Gering Irrigation District, and each thereof be enjoined and restrained from diminishing the flow from said river to plaintiff's headgate below 173 second-feet to be divertible therein continually each irrigating season; (7) to determine the volume plaintiff must permit to flow down said channel for use of other defendants; (8) for such other and further relief as may be just; (9) for costs.

Printed Record, pages 21 and 22.

ANSWER AND CROSS-PETITION of Winters Creek Irrigation Company, filed December 6, 1910. For first defense it admits all allegations of the amended and supplemental petition shown *supra*, except it avers plaintiff had knowledge long prior to January 7, 1897, that said answering de-

fendant had appropriated for irrigation 124 second-feet of water from said river by means of its Winters Creek canal, of earlier date than that of plaintiff; also that the Farmers canal had diverted and duly used sufficient water to irrigate 500 acres, i. e., about 10 second-feet, and that the owner of the Minatare canal had so diverted and used about 150 second-feet, each of priority date earlier than either the Enterprise or Winters Creek.

Printed Record, pages 119 and 120.

Paragraphs 1 to 8, inclusive, of said cross-petition aver facts to show an appropriation by said Winters Creek canal of priority date October, 1888, of 124 second-feet of water from said river; also after said company had presented evidence to sustain its statement of claim to said appropriation, an opinion was rendered by the secretary of said state board of irrigation on January 13, 1897, allowing the same. Said opinion was affirmed by said board in its general resolution of April 7, 1897.

Printed Record, pages 120 to 124.

Said cross-petition then proceeds:

The Farmers Canal Company in the spring of 1888, began to construct its Farmers canal. Its headgate is about 16 miles above that of the Winters Creek. Said company on September 16, 1887, posted and had recorded notice of its intention to construct such ditch. (Then follow allegations as to small amount of construction work and use of said Farmers canal corresponding to statement on that subject in the Enterprise petition referred to *supra*.) (Par. 9.)

May 28, 1895, the county clerk of Scottsbluff county transcribed said notice of intention; three days later the secretary of said state board of irrigation filed said transcript in his office. June 5, 1896, said secretary sent notice to said Farmers Canal Company that he would sit at Gering, Nebraska, on July 17, 1896, to hear proof of any claims for rights to use water from the North Platte river, effected before April 4, 1895, and that claimants were ex-

pected to attend said hearing to make proofs, each of its right. Thereafter on said noticed day and place three witnesses, one Ford, one McCoskey, and one W. H. Wright, appeared on behalf of said Farmers Canal Company to offer proofs on its behalf. At said time no "claim for the waters of Nebraska" was or had been filed or verified on behalf of said company for any appropriation. The only proof introduced before said secretary on that subject was that of said three witnesses, in substance as follows:

By said Ford: Notice of intention to construct said Farmers canal was posted September 16, 1887, and at once duly filed for record. Some construction work on said canal was done in November, 1887. It was then built of 12 feet bottom width, calculated to run water 2 feet deep. As first constructed, it was 10 miles long. Some water was diverted thereinto in 1888, when several farms were irrigated thereby, in 1890, perhaps 200 acres, and prior to said hearing in 1896, possibly 500 acres. Another notice of intended appropriation was posted and filed on behalf of said Farmers canal November 17, 1890, and again March 14, 1895. Some enlargement of the original canal had been made about which I cannot testify.

By said McCoskey: I worked with the engineers on said canal part of the time; to some extent was present during its enlargement. At its head it was enlarged to be 100 feet wide, tapering down to a width of 60 feet about 5,000 feet from its headgate; from that point it was constructed 30 feet wide (one-half the surveyed width) for about 15 miles further. I know nothing about the area irrigated under said ditch up to date of said hearing, or how much land it was designed to irrigate. Its headgate was constructed to leave 108 feet clear water space in width; such a headgate would cost about \$10,000.

By W. H. Wright: Am president of The Farmers Canal Company; have known it since January, 1891; it has been enlarged for its first half-mile to 60 feet width, for next mile 30 feet (half the size planned). At said point the intention is to put in sandgates and below them to make

it 45 feet wide. It has been constructed for 17 miles below said sandgates for one-half that width. It has been surveyed and cross-sectioned for 71 miles. The preliminary survey ran 10 miles further. Below the 19 miles where it has been finished, and for the next 15 miles the work has been opened for full width, but perhaps only one-half finished for 19 miles. About \$100,000 has been expended thereon. It was designed to furnish water to 80,000 acres; said acreage is under the proposed line to the end of the preliminary survey. Most of said land cannot be irrigated until the canal is constructed to the surveyed lower end. Now (July, 1896), work on the ditch has ceased for about seven months. Negotiations are in progress giving hope of resuming work (par. 10).

Printed Record, pages 124 to 126.

At and before the pretended adjudication of said Farmers canal appropriation, no other testimony was offered about it. No other appropriator from said river was notified or put on inquiry to suppose that by means of said canal an appropriation had been effected to irrigate more than 500 acres needing about 10 second-feet of water. Said Farmers Canal Company by its agents did not file with said secretary of said state board any "claim to the waters of the State of Nebraska" until September 19, 1896. Its claim then was filed endorsed "Claim No. 323, Division No. 1-A." Therein it was asserted that said canal for the first 19 of a proposed 81 miles length had been completed for one-half size; that the remaining 62 miles was only *in posse*; that the total intended excavation would be 3,125,000 cubic yards of material and 150 feet of fluming; that the material actually removed was about 600,000 cubic yards; that no fluming had been completed; that the estimated cost was \$350,000, of which only \$98,000 had been expended. Those parts of the blank form prepared by said state board calling for date of completion of work, completion of appropriation, date when water had been turned into the ditch, and the acreage of crops actually irrigated, were left blank. In said so-called "claim" it was stated:

"13th. That the time stated as necessary to provide for the application of the amount of water herein claimed is five years from April 4th, 1895" (par. 11).

Said so-called "claim" so filed months after introduction of said proofs failed to show any perfected appropriation. It did not constitute a pleading to justify adjudication of an appropriation then completed; it failed to give any rival claimant notice of any asserted facts on which to base such result. On its face it purported to be nothing more than an application for a *permit* to divert water then unappropriated. No copy of said "claim" was ever served on any other appropriator. Said proof (so offered months before filing of said "claim") gave no notice, constructive or otherwise, of an asserted appropriation effected by means of said canal save for the needs of 500 acres (about 10 second-feet of water (par. 12).

Notwithstanding what precedes, the secretary of said board on January 7, 1897, at Lincoln, Nebraska, rendered and filed in his office an "opinion" on said "claim." [Substance of said opinion averred in said pleading is omitted here, because full synopsis appears *infra* at page 41, as a part of the stipulated facts.]

Thereafter on April 7, 1897, at a meeting at Lincoln, Nebraska, said state board without any notice to any rival claimant pretended to affirm said "opinion" (par. 13).

Printed Record, pages 125 to 129.

Said opinion of said secretary and said resolution affirming it were without jurisdiction and constitute no adjudication because not founded on any proof, pleading or "statement of claim" required by the regulations of said board. On its face it purports merely to permit a prescribed time in which to perfect an appropriation for land to be irrigated from said canal, and then only for one-seventieth of one second-foot per acre of land so irrigated before September 1, 1904 (par. 14).

No copy of said opinion or resolution was recorded in the office of any county clerk until many years after 1897. This defendant had no notice of either for more than ten years thereafter (par. 15).

For eleven years thereafter, viz.: from 1897 to 1907, both inclusive, this defendant under its completed appropriation of 124 second-feet of water diverted that quantity throughout each irrigating season to irrigate 7,000 acres under its Winters Creek canal on claim of a priority superior to that of said Farmers canal except for 28 second-feet. Conditions frequently arose where if said Farmers canal had diverted more than 28 second-feet, this defendant would have received much less water, because said river in July, August and September of each of said years had so small a flow that, as it was, it could not divert into its Winters Creek canal as much water as crops depending thereon required. In said 11 years valuable crops needing irrigation during said months, viz.: Corn, alfalfa, potatoes and sugar beets, were raised solely by means of water from said Winters Creek canal.

Because of said facts, the claim of an appropriation by said Farmers canal, if any existed as result of said opinion of said secretary and its affirmance by said state board, was wholly lost, is barred by the Nebraska 10-year statute of limitation or prescription, and has thereby been abandoned (par. 16).

Printed Record, pages 129 and 130.

Beginning in September, 1906, the Tri-State Land Company began to enlarge and extend said Farmers canal; it prosecuted said work until the fall of 1907; during that time it enlarged it at its headgate and for some distance below to bottom width of 90 feet and a depth of 11 feet; it extended it easterly to a point about 40 miles from its head to render it capable of irrigating about 40,000 acres. Defendants, The Tri-State Land Company and The Farmers Mutual Canal Company, intend hereafter to extend it 40 miles further with the intent ultimately to irrigate 80,000

acres. Because of said "opinion" of said secretary and its "affirmance" by said board in 1897 (though for more than 10 years thereafter only 28 second-feet of water had been diverted into said Farmers canal), they now wrongfully claim the right to divert hereafter as of priority dating from 1887, besides said 28 second-feet, many hundreds more—ultimately as much as 1,142 second-feet—to irrigate land which before 1908 had ever been arid. In 1909 and 1910 they diverted into said Farmers canal hundreds of second-feet of water more than the maximum diversion prior thereto; thereby they wrongfully deprived this defendant of water to which it was justly entitled, to the great injury of growing crops of its stockholders. Unless enjoined said wrongful claim will hereafter be asserted and increased to a total diversion of 1,142 second-feet into said Farmers canal which heads above the Winters Creek and said wrongful claim will be recognized by said state board of irrigation of Nebraska (par. 17).

This cross-petitioner is without remedy save in a court of equity. Neither plaintiff nor any defendant has an earlier appropriation from said river than that of this defendant except the owner of the Minatare ditch, to the amount of water it may prove that it diverted, and except defendants, Tri-State Land Company and Farmers Mutual Canal Company, to the extent of not less than 10 or more than 28 second-feet of water diverted by their grantor of earlier priority date (par. 18).

Printed Record, pages 131 and 132.

The prayer of said Winters Creek cross-petition is for judicial decree to determine (1) that the Farmers or Tri-State canal has no earlier priority than that of the Winters Creek ditch except for 28 second-feet of water; (2) that defendant owning the Minatare ditch have its appropriation of an earlier date than that of the Winters Creek defined and limited; (3) that save for said earlier priorities so to be defined, this cross-petitioner has the first appropriation of water from said river as against all litigants herein to extent of 124 second-feet; (4) that plaintiff and all the defendants be enjoined to respect said rights.

Printed Record, pages 132-3.

ANSWER OF THE TRI-STATE LAND COMPANY, joined by its co-defendant in error. Said answer to said pleading of The Enterprise Irrigation District, which, by consent, was treated as responsive to all the cross-petitions, is in substance as follows:

Its first nine paragraphs admit the averments of said petition of the Enterprise Irrigation District as to said plaintiff's appropriations.

Printed Record, pages 97 and 98.

Its tenth paragraph avers: Each litigant, save the respective owners of the Gering and Steamboat canals, properly filled out the blank form of "claim to the water of the state of Nebraska." Thereafter on June 5, 1896, notice was duly issued by the secretary of the state board of irrigation that said claims would be heard and determined. On said noticed time and place evidence was introduced and hearing had on the claims of the respective owners of the Farmers, Minatare, Winters Creek, Enterprise, Castle Rock, Central, Nine Mile and Ramshorn canals. On the same notice, at Bayard, Cheyenne county, Nebraska, like evidence was had on the asserted claims of the Chimney Rock, Alliance, Browns Creek and Belmont canals. Later said secretary on said evidence rendered several opinions determining the priority of each canal, fixing dates and quantities appropriated as severally pleaded by their respective owners.

Defendants owning severally the Steamboat and Gering canals were not organized until after the Nebraska irrigation act of 1895 was passed. Each of them applied to said state board for permit to appropriate water then unappropriated. Thereafter on permits and subsequent proof of compliance with conditions thereof by actual diversion and use of water, said board allowed to the Steamboat Ditch Company 15 second-feet of water of priority date October 22, 1895, and to the Gering Irrigation District 500 second-feet, of date March 15, 1897.

Printed Record, pages 99 and 100.

The eleventh and twelfth paragraphs of said answer admit filing of statements of claim by plaintiff and sundry other defendants, the opinions of secretary affirmed by state board of irrigation thereon and sufficient water supply for plaintiff, with very rare exceptions.

The thirteenth paragraph, after certain admissions, proceeds:

Said Farmers Canal Company duly posted notice on September 16, 1887, and had the same duly recorded. It continued work on its canal from March 1, 1888, until about November 1, 1893. During said time it constructed a substantial headgate of size and capacity adequate to divert water to irrigate 80,000 acres of land. It expended on said headgate and in excavating work about \$100,000. Said excavation was for the full intended width for about one mile from the headgate; for the next 19 miles to about half its intended size; below that point portions were made at intervals in the next 25 miles, making in all about 38 miles of excavated ditch by November 1, 1893. Thereafter no construction work was done by said company; certain occasional repairs were made.

To procure funds to carry on its enterprise, said company executed mortgage on its canal, water rights, franchises and all other property. Said mortgage was foreclosed in the United States Circuit Court for Nebraska in 1901. One Roberts Walker became its owner at Master's sale.

On April 14, 1902, after said sale was confirmed, one Wm. Frank filed with the secretary of said state board of irrigation his application for permit to divert 2,200 second-feet of water from said river, proposing to make a canal 150 miles long to irrigate 150,000 acres. His proposed point of diversion and line of canal was substantially that of the Farmers canal. At a hearing of said application before said board, protests were filed by the Farmers Canal Company and by said Walker, who claimed a prior appropriation to irrigate the same land for 81 miles under the proposed canal. An opinion and order was rendered

by said board which confirmed the rights of said company and Walker so far as the same appear in the previous order of said board of April 7, 1887, and granted the application of said Frank as subject to said asserted prior rights. From said order an appeal was taken to the district court. Said case finally reached the supreme court of Nebraska, where in June, 1904, the said order of said board confirming the rights of said company and Walker to 1,142 second-feet of water was affirmed. On October 20, 1904, said Walker conveyed all the property formerly owned by said Farmers Canal Company to the Tri-State Land Company.

Printed Record, pages 100 to 102.

Admits that no work was done on said Farmers canal during said foreclosure proceedings or during the pendency of said appeal of Frank; also that in 1906, The Tri-State Land Company enlarged said headgate and said canal for some distance below to a bottom width of 90 feet and depth of 11 feet; it then united its previously detached portions, then extended and completed it easterly for about 40 miles from headgate to make it capable of irrigating 40,000 acres. In 1907, said company resumed said work and completed same to distance of 60 miles from headgate, making the canal suited to irrigate 60,000 acres.

Said Tri-State Land Company, since becoming owner in 1904, in good faith has claimed and still claims the right to 1,142 second-feet of water to flow continually through said canal from said river, of priority date September 16, 1887. Believing itself to have such right, it constructed and completed said canal from its original initial point to terminus intended and designated when the claim of Farmers Canal Company was filed with said state board, under which it was adjudicated such appropriation. It has erected a large needle diverting dam across said river to divert said quantity. It has so completed and extended its said canal as to enable it to irrigate all the land for which said 1,142 second-feet was originally appropriated, as adjudicated by the said state board. It has expended more than \$2,500,000 on said project, publicly claiming all the time

its right to divert 1,142 second-feet of water from said river, of priority date September 16, 1887, as prior to that of any other litigant herein, all of which plaintiff and said other litigants well knew; notwithstanding said knowledge, they made no claim of right to use any of said water as superior to that of this answering defendant, but stood by allowing it to expend its money in said belief and claim of right (par. 14).

Printed Record, pages 102 and 103.

Paragraph 15 of said answer admits, (1) the making inquiry and taking evidence July, 1896, by the secretary of the state board of irrigation concerning the right of the Farmers Canal Company; (2) the filing later, September 19, 1896, with said secretary said company's claim to 270,000 miner's inches from said river; (3) the rendition, January 9, 1897, of said secretary's opinion on said claim as stated, allowing 1,142 second-feet, dating from September 16, 1887; (4) that said opinion undertook to limit to September 1, 1904, the time to apply said water to use. It alleges that said secretary and board had no power to impose said condition or limitation, which lack of authority was adjudicated by the Supreme Court of Nebraska on an issue later presented (referring to Farmers Irrigation District vs. Frank, 72 Neb. 136).

Printed Record, page 104.

Said answer further proceeds: Resolution of said state board, April 7, 1897, affirming its secretary's opinions previously rendered is admitted. No appeal was taken therefrom; it remains in full effect (par. 16). Admits, also, at dates of said opinion and resolution the claim filed by said Farmers Canal Company on its face showed its construction of only a portion of said canal; but alleges constant claim of appropriation of 1,142 second-feet of priority date September 16, 1887, earlier than right of any other litigant; further, that Tri-State Land Company since becoming owner has proceeded to complete the canal as rapidly as its finances have warranted (par. 17). Each year during its building operations, it has applied more and

more of its claimed appropriated water as its canal, lateral ditches therefrom and increased irrigable area thereunder have rendered possible. At large expense it has built a permanent needle dam on steel and concrete base and frame; in said canal about a mile below its headgate it has made a large wasteway of concrete reinforced with structural steel so as to force back to said river, sand, mud and surplus water. Said structures were built before beginning of this suit (par. 18).

Printed Record, pages 104 and 105.

Admits that during most of irrigating season of 1910 it diverted several hundred, though less than 1,142 second-feet of water; also that said state board of irrigation, when applied to by plaintiff, refused to restrict the Farmers canal below 1,142 second-feet, but did close plaintiff's headgate. It denies allegations not admitted.

Printed Record, pages 105 and 106.

REPLY OF PLAINTIFF TO SAID ANSWER.

Said reply, filed January 30, 1911, appears in printed record herein at pages 144 to 149, inclusive. It is to effect following:

Admits that the secretary of said state board of irrigation issued a notice dated at Lincoln, Nebraska, June 5, 1896, but not after filing of all claims. Denies that said notice stated that rights of claimants would be determined July 17, 1896, or specified any time for such determination. Said notice (copied) is in effect as follows:

Secretary's Notice.

Notice is hereby given that the hearing *in re* adjudicating rights to use of water claimed prior to April 4, 1895, within the water-shed of the North Platte and Platte rivers, will be held for the several counties therein by an officer of the state board of irrigation at places and times in 1896 as follows: For certain counties (specified) at court house at Lexington, on July 7; for Lincoln county, at court house at North Platte, July 8; for Keith county, at court house in Ogallala, on July 10; for Deuel

county, at court house in Chappel on July 11; for Cheyenne and Banner counties, in Bayard on July 14 and 15; for Scotts Bluff and Sioux counties, at office of O. W. Gardner in Gering, July 17. Claimants are expected to attend at hearings in their respective counties to furnish the officer presiding thereat with the necessary proof, if any be required, to sustain their claims. Otherwise said claims will be dismissed.

Said notice was signed "State Board of Irrigation, W. R. Akers, State Engineer, Secretary."

The foregoing was the only notice ever forwarded by said board, its secretary or any agent, to any party hereto.

Admits that on July 14 and 15, 1896, said secretary of said board remained in said Bayard to inquire and take evidence *in re* claims to divert and use water; on said July 14 he heard certain evidence concerning respective claims by owners of Chimney Rock, Nine Mile and Alliance canals; that day the claim on behalf of Belmont canal was submitted without evidence. Said secretary was at Gering July 17, when he took evidence *in re* claims filed for grantors of Ramshorn ditch, the Winters Creek, Enterprise, Castle Rock, Central and Minatare canals. No claim of appropriation was then or before filed by the Farmers Canal Company, but it submitted evidence about its canal (stating briefly what appears *supra* in answer of Winters Creek Irrigation Company).

All evidence so taken was reduced to writing and made matter of record in said secretary's office.

Plaintiff denies any claim of any litigant was adjudicated by said secretary or by said board or other authority on said days, pursuant to said notice, or at all.

Admits said secretary rendered an opinion on each claim severally on these days in January, 1897, viz.: on the 7th, *in re* Farmers, Enterprise, Minatare and Castle Rock canals; on the 8th, concerning the Nine Mile; on the 13th, relative to the Winters Creek; on the 26th, about the Ramshorn; on the 28th, *in re* the Browns Creek ditch. On April 7, 1897, said state board of irrigation adopted a resolution affirming said various opinions. On August 10, 1898, said

secretary rendered an opinion concerning claim filed for the Belmont; on August 12, 1898, for the Alliance; on September 13, 1898, for the Chimney Rock canal. January 2, 1899, said state board adopted a resolution affirming said three opinions.

No notice was given or sent out by said state board or by its secretary or other member or agent, of the rendition of either of said opinions or adoptions of either said resolution.

Plaintiff avers, to give said opinions or either of them the effect of a judgment, decree or binding adjudication whereby the Tri-State Land Company or its successor shall be awarded an appropriation of 1,142 second-feet of water senior to plaintiff and other users of water from said river will deprive plaintiff and the remaining litigants of their property without due process of law and deny to them the equal protection of the laws in violation of Section 1 of Article 14 of Amendments to the United States Constitution.

Admits following averments in paragraph 13 of said answer, viz.: (1) Posting of notices, (2) beginning of construction on Farmers canal in 1888, (3) continuance thereof until some time in 1890, (4) resumption of said work from spring of 1892 to November, 1893, (5) construction during that time of substantial headgate, (6) expense of about \$100,000 on all said matters; (7) in said work excavation for full intended width for one mile from headgate, for next 18 miles for about half the size then intended, also excavation prior to November 1, 1893, of detached portions of the canal below such partially excavated part for distance of about 15 miles. Denies such detached excavations for longer distance. Admits issuance of certain bonds and mortgage by Farmers Canal Company, for franchise thereof, and title to its former property in Roberts Walker by foreclosure decree. Also admits one Wm. Frank, on April 14, 1902, filed with secretary of said state board of irrigation, his application for 2,200 second-feet of water from said river proposing to make a canal 150 miles long to irri-

gate 150,000 acres to head at head of Farmers canal and to occupy and follow upper portion of its line, also the filing of protests by said canal company and Walker against the granting of said permit; also that after hearing of said protests, said board, by order, denied said application of Frank for permit to appropriate water to irrigate any land covered by the proposed first 80 miles of said canal; that an appeal was taken by said Frank; that ultimately said cause reached the supreme court of Nebraska. But denies that any rights claimed by either said company or Walker were confirmed by said court.

Avers that no party to the present suit was party to said action, and that no party here except defendants in error (the grantees of said canal company and Walker) are bound by any adjudication in said proceeding.

Admits since said Tri-State Land Company became owner of the property formerly belonging to said Farmers Canal Company it has claimed and still claims a right to have 1,142 second-feet of water flow continuously through its canal of priority date September 16, 1887, but denies such claim was made in good faith.

Avers no notice of said claim was ever served or given this plaintiff or any other party to this action. Shortly before beginning this suit, plaintiff learned only by rumor and hearsay of said asserted claims of said defendant. After so learning, plaintiff disputed said claim of priority in favor of said Farmers canal to any water in excess of the quantity beneficially used thereunder before said Tri-State Land Company began to reconstruct and enlarge it.

In 1906, some other water users from said river having learned of said claims of said defendant, notified its managing directors that said other users claimed priorities superior to that of said company for the amount of water they severally had been wont to divert and use from said river, except as against the quantity diverted and applied to use under said Farmers' or Tri-State canal before its enlargement by said defendant.

Avers further, said defendant enlarged said Farmers canal with full knowledge that its asserted claim was and would be disputed by the other users of water from said river.

Plaintiff denies it made no claim of right to divert and use water from said river prior to that of said defendant, or that it stood by and allowed the latter to incur large expense in belief of its right as now asserted. Also denies that said defendant did believe it had a right to appropriation to the extent of 1,142 second-feet of priority date September 16, 1887. Avers plaintiff at all times asserted and claimed priority of appropriation of date earlier than that of said Tri-State Land Company, save and except so much water as grantors of the latter had diverted and applied to beneficial use through said Farmers canal before said defendant began enlarging the same. Plaintiff denies every allegation in said answer not heretofore admitted except such portions as constitute admissions of facts alleged in plaintiff's amended and supplemental petition.

Wherefore plaintiff prays for decree as demanded in its said former pleading.

SYNOPSIS OF STIPULATION OF FACTS.

It is agreed what follows may be taken as established facts on the trial in so far as the same may be material, each party reserving objection to materiality of any such fact. Said facts are:

First. Before irrigation of lands under the several ditches mentioned, they were semi-desert. Without irrigation the raising of crops thereon is uncertain, but with it they can produce large and valuable crops. All said land is in the North Platte valley. The amount of water flowing in said river bed varies greatly at different seasons. During April, May and June, it is usually sufficient to supply the needs of all canals thus far constructed from said river, which has no tributaries between the headgate of the Farmers or Tri-State canal and those of the other canals referred

to. If no water were diverted into said Tri-State canal or below its head, the flow in said river would be about the same at the lowest as at the upper headgate.

Printed Record, page 214.

Second. On September 16, 1887, The Farmers Canal Company posted at its intended canal head in said river and had recorded in office of proper county clerk, notice of its intention to divert for irrigation, water sufficient to fill a canal of bottom-width 40 feet and of water-depth 4 feet. In March, 1888, it began construction of said canal and continued work thereon until about 1890, when said canal was constructed about 10 miles easterly from its diverting point; its bottom width was then about 12 feet; just below its headgate and for first mile it was about 6 feet deep and capable of carrying water to depth of 2 feet. There were not more than 1,500 acres of land susceptible of irrigation from said canal as then constructed; its capacity was inadequate to carry water for more than 1,000 to 1,200 acres.

Printed Record, pages 214 to 215.

Third. About November 17, 1890, said company posted at its headgate a second notice of intention to appropriate in addition to its former claim the use for irrigation and other useful purposes of 200,000 miner's or statute inches (each such inch being the quantity of water to flow continually through an orifice one inch square and a partition one inch thick under 4-inch pressure). Said notice specified said proposed canal should be of bottom width 80 feet, side slopes one to one, depth 8.84 feet at diverting point, average grade not more than 2 feet per mile. About November 18, 1890, said notice was recorded in county clerk's office of Scottsbluff County.

Printed Record, page 215.

Fourth. Said company, to finance continuance of said work, in 1891 authorized a \$250,000 bond issue, secured by trust deed on all its property; of that issue, it sold about \$80,000 in face value. From proceeds of said sale

it resumed work on said canal in spring of 1892; it then constructed substantial headgate at diverting point 136 feet wide in clear, costing about \$8,000, and excavated its canal to width 100 feet for first 500 feet immediately below its headgate; from that point for next 4,000 feet to bottom width of 60 feet; thence to point about 19 miles below its headgate to bottom width of 30 feet. Water was diverted from said river into said canal, which as then constructed had grade of 2 feet per mile for first mile, thence of seven-tenths feet per mile; it could carry water to depth of 6 feet; its capacity was sufficient to irrigate 30,000 acres. Next below the point 19 miles from headgate, said canal had been opened up for 25 miles further at various places to full depth; nearly a fourth of the construction work on said 25 miles had been performed in detached parts not connected with the fully constructed upper 19 miles in which water was flowing. All said work had ended on June 1, 1893, at total cost of about \$96,000. Said company then ceased work on said canal because of its inability to sell more bonds or to procure funds. It then discharged all workmen except one team, which continued excavation work until October, 1895. Thereafter no further construction work was done by said company. At that time there was susceptible of irrigation from said canal 5,661.5 acres; also 2,540 acres more lying under the Enterprise and Ramshorn ditches, which acreage was between said Farmers canal and said river.

Before 1897 not more than 500 acres had been annually irrigated from said Farmers canal, as appears from evidence taken on July 17, 1896, set forth *infra*. Before 1907, not more than 2,000 acres had so been irrigated; in 1907, 5,000 acres, in 1908, 7,000 acres, in 1909, 10,000 acres and in 1910, 20,000 acres were irrigated from said Farmers canal.

After said Farmers Canal Company suspended work, it employed a superintendent and kept said canal in repair until 1898, after which certain persons owning water rights thereunder and other land owners under its line continued to irrigate their land therefrom. Said persons, with the

consent of said company and its successors, kept said canal in repair until The Tri-State Land Company took possession thereof; with the exception that in 1897, the river began to cut its banks at, near and around the headgate, making it necessary to protect the latter. Then said Farmers Canal Company employed and paid a superintendent properly to protect said banks and preserve said headgate. The said superintendent then employed men and did work on said headgate.

After work on said canal ceased in 1893, said canal company, through its officers, sought to sell other of its bonds secured as aforesaid; failing in this, it sought to exchange such bonds with different contractors to complete the canal; said negotiations continued until after the foreclosure of deed of trust referred to *infra*.

Printed Record, pages 215 to 217.

In said stipulation, paragraphs numbered 5th to 56th, inclusive, state in detail the admitted facts pertaining to the beginning and completion of construction of the canals of the thirteen plaintiffs in error severally, their respective diversions and application of water to use, dates, quantities claimed, quantities actually diverted in second-feet and other like topics pertaining to each canal. There is no dispute but what said matters support and justify the findings and decretal orders of the trial court as to dates and amounts of their respective appropriations. For convenience of reference we tabulate said matters.

Canal.	Stipulation Paragraph.	Record Page.
Minatare	6th, 7th and 8th.....	217 and 218
Winters Creek..	9th	218 and 219
Enterprise	10th to 16th.....	219- 221
Castle Rock.....	17th, 18th and 19th...	221 and 222
Belmont	20th and 21st.....	222 and 223
Central	22nd to 27th.....	228- 230
Chimney Rock...	28th to 30th.....	230 and 231
Alliance	31st to 35th.....	231 and 232
Browns Creek...	36th and 37th.....	232 and 233
Ramshorn	38th to 41st.....	233 and 234
Nine Mile	42nd to 45th.....	234 and 235
Steamboat	46th to 50th.....	235- 237
Gering	51st to 56th.....	237- 240

The priorities of the Steamboat and Gering canals are of later date than April 4, 1895. They were initiated under the permit sections of the irrigation act of that date.

The Steamboat Ditch Company on October 22, 1895, applied for a permit (which was conditionally granted by the state board of irrigation) to divert 35 second-feet of water into its proposed ditch to irrigate lands (described). Five conditions were imposed, viz.: (1) Construction work should begin April 1, 1897; (2) said work should be completed by September 1, 1900; (3) same time was given to complete application to beneficial use; (4) its appropriation should not exceed 15 second-feet and should be limited to one second-foot for each 70 acres irrigated; (5) since territory claimed and water already acquired by others was then undetermined, it was stated, "This permit may not carry with it the right to any water, nor to irrigate all the territory applied for." Said company about July 17, 1903, in due form filed proof with said state board of having irrigated 830 acres of land (described) by means of its completed ditch.

The Gering Irrigation District in like manner applied for permit March 15, 1897, granted by said board on like five conditions as in the Steamboat ditch case, varying therefrom only in providing that the appropriation should not exceed 500 second-feet and that construction work on its canal should begin by June 1, 1898. Said district on October 27, 1905, filed with said board due proof of completion of its canal and area irrigated so that on November 2, 1907, said board issued its certificate showing appropriation by said district of 208 second-feet to irrigate 14,621.34 acres (described).

Printed Record, pages 235 to 240.

57th. On May 31, 1895, the respective county clerks of Scottsbluff and Cheyenne counties, Nebraska, caused to be filed in the office of the secretary of the state board of irrigation transcripts of the several notices of appropriation then or theretofore filed in their respective offices. Soon

thereafter said secretary forwarded to each claimant named in said notices a blank "claim for the waters of the state of Nebraska" to be filled out to give information therein required regarding the claim of each such party.

Printed Record, pages 240 and 241.

Then follow several paragraphs showing that all plaintiffs in error except The Gering Irrigation District and The Steamboat Ditch Company duly filled out and verified on blank forms supplied, their respective claims for appropriations and returned same to the secretary of said state board. Said eleven statements of claim are copied in full in the report. For convenience we tabulate the same as follows:

<i>Name of Canal.</i>	<i>Date of Filing Statement.</i>	<i>Paragraphs of Stipulation.</i>	<i>Pages of Printed Record.</i>
Browns Creek,	May 31, 1895,	58th	241
Chimney Rock,	June 28, 1895,	59th	242
Castle Rock,	July 5, 1895,	60th	243
Alliance,	July 17, 1895,	61st	243
Nine Mile,	Aug. 12, 1895,	62nd	245
Central,	Aug. 13, 1895,	63rd	246
Winters Creek	Sept. 20, 1895,	64th	247
Belmont,	Sept. 30, 1895,	65th	248
Ramshorn,	Oct. 6, 1895,	66th	249
Enterprise,	Oct. 15, 1895,	67th	250
Minatare,	July 17, 1896,	71st	259

67½th. Said state board of irrigation August 20, 1895, by resolution adopted (here condensed) following

Rules and Regulations.

1. Rights to use water claimed within watershed of the Republican river shall first be adjudicated; other water-sheds shall be taken up in such order as the secretary may deem expedient.

2. Adjudication of such rights for irrigation and other useful purposes as provided by the irrigation law approved April 4, 1895, shall be conducted by water-sheds as defined by the state engineer, he being secretary of this board.

3. The first adjudication of rights of claimants shall be to determine the validity of claims,

the land covered in case of irrigation canals, the date when work must be completed in case of uncompleted canals, and the time within which the water claimed must be applied to beneficial use.

4. Such adjudications in each water-shed shall be preceded by hearings to be held in each county thereof wherein notices of appropriation were recorded before April 4, 1895; provided hearings for two or more counties may be held at same time and place if the secretary deems it expedient.

5. Said hearings shall be held to receive testimony offered by parties in interest in support of rights claimed. The secretary, his assistant or an under-secretary of this board, will preside thereat and keep complete record of the proceedings.

6. All evidence, whether oral or in depositions, shall be submitted in typewriting. If oral, it shall be taken down and transcribed at expense of the offering claimants.

7. The officer conducting the hearing may limit number of witnesses on any one point, provided in cases of controversy an equal number shall be heard upon both sides.

8. Claimants may appear in person or by attorney, but appearance must be made on day or days specified for the hearing for the county wherein the claim is located.

9. Claimants having filed with said secretary 10 days before first hearing announced, affidavits in prescribed form entitled "claim for the waters of the state of Nebraska," need not appear at said hearing unless they wish to offer additional testimony to support their claims.

10. Points of law made by claimants or their attorneys with authorities cited thereto must be submitted in typewriting.

11. The record in the case of each claim shall consist of: 1st, the original notice filed with the county clerk; 2nd, a claim affidavit signed and verified; 3rd, additional testimony offered at hearing to support the claim; 4th, points of law and authorities in support thereof, submitted in writing; 5th, decision of secretary which shall be reviewed by the board only on exceptions taken at time of hearing and determination.

12. Said secretary shall mail to postoffice address of each claimant of record at least ten days before first hearing announced, a copy of this resolution together with a notice of dates and places of hearings to be held within the water-shed to be adjudicated.

13. If the postoffice address of a claimant is unknown, said resolution and notice shall be mailed to such claimant in care of the county clerk of the county wherein the claim is located.

14. The secretary shall determine dates and places of hearings in the various water-sheds; he shall be empowered to establish such minor rules and regulations governing said hearings as he shall deem necessary.

Printed Record, pages 251 and 252.

Pursuant to authority so granted said secretary, under rule 14 last *supra*, he prepared and established (here condensed) following:

Secretary's Rules in re Practice in Matters of Contests.

1. Any party wishing to contest a claim shall file with the state board written notice of contest, including statement of grounds thereof with verified proof of service of copy of said notice and statement on the opposite party. Within 15 days from said service, the contestee shall file with the state board his answer, if any, with verified proof of service of copy thereof upon contestant, who shall then have 10 days from date of such service in which to file with said board a reply; provided said board may extend the time for answer and reply on good cause shown.

2. Where the contestee is a non-resident or can not be found in the state, contestant shall file with the board in lieu of said verified proof of service, an affidavit setting forth the facts, whereupon the board will designate some newspaper published at the county seat of the county within which the original notice of appropriation was filed, in which newspaper notice shall be published for three successive weeks, setting forth: (a) that such contest has been instituted, the name and residence of the contestant or his attorney of record;

(b) name of claimant, name of stream from which the contested appropriation is claimed and date on which notice thereof was filed with county clerk; (c) that notice of contest and statement of its grounds is on file with the state board; (d) date of filing answer by contestee, which shall not be earlier than 10 days from last publication of notice.

3. On or before date set for filing answer, said non-resident or absent contestee shall file the same with state board with verified proof of service of copy thereof on contestant or his attorney of record.

4. Said statement of grounds of contest and answer thereto shall be verified.

5. Service upon corporations may be made on same officers and in same manner as of a summons in a court of law.

6. Proof of publication of said notice shall be filed with the board on or before date set for filing of answer.

7. When issues have thus been made up, the board will set the place and date to take testimony and hear the cause. Each party will be notified thereof by mail or otherwise, as the board may determine.

8. At time and place designated for hearing, each party shall produce his evidence, contestant opening. Oral arguments may be heard, in discretion of board.

9. Continuance may be granted, in the discretion of the board on good cause shown.

10. Testimony offered may be oral or by deposition. If oral, it must be taken down by stenographer and transcribed at expense of the party offering it; but expense of cross-examination shall be borne by the opposite party. Depositions submitted must accord with rules governing same in a court of law. Affidavits will only be received in *ex parte* matters.

11. Copies of opinions handed down by the secretary in matters of adjudications and contests shall, upon the same day as the date of said opinions, be mailed to the parties in interest.

12. If the postoffice address of any person is unknown, the decisions of the secretary shall be mailed to said claimant.

Printed Record, pages 252 and 253.

*Rules in re Appeals from Secretary's Decision in
Matters of Adjudication and Contests.*

Rehearings Before Secretary.

Any person deeming himself aggrieved by any decision of the secretary may within 10 days after receiving copy thereof, file with said secretary an application for rehearing, which shall set forth the grounds relied upon therefor in ordinary and concise language, supported by affidavit. No appeal to the board shall be allowed until such motion has been made and the same acted upon by the secretary.

Appeal to State Board.

1. Any person deeming himself aggrieved by any decision of said secretary on rehearing may appeal to the state board of irrigation by filing within 15 days after date of such finding, a notice of appeal with typewritten brief and proof of service of said notice and brief on parties adversely interested; all pleadings, motions, affidavits, etc., to be typewritten.

2. An appeal, claim or contest will be reviewed by said board on brief or briefs submitted and the parties thereto will be informed of the decision of said board as provided by law.

Rehearing Before State Board.

1. Any person deeming himself aggrieved by any decision of said board, on appeal from the secretary's decision, may within 40 days after receipt of copy of said findings file with said board a motion for rehearing. Said motion shall specify grounds thereof, shall be supported by affidavit and separate typewritten brief.

2. Decisions of the secretary from which appeals are not taken as herein provided will be affirmed by the board.

Printed Record, pages 253 and 254.

Before June 5, 1896, the secretary of said board had printed in pamphlet form, said rules adopted by said board on August 20, 1895, together with said rules prepared by said secretary, set forth *supra*. Said rules were accepted by said state board and its secretary in matters of procedure thereafter coming for hearings before said board.

68th. On June 5, 1896, said secretary severally mailed a notice with a copy of said rules addressed to the post-office address of all parties to this suit except The Steamboat Ditch Company and The Gering Irrigation District. The substance of said notice appears *supra* at page 23.

69th. Said notice was the only notice of any kind or description forwarded to any party to this action of the hearings to be had on July 14, 15, 16 and 17, 1896.

Printed Record, pages 254 and 255.

70th. W. R. Akers, said secretary of said board, at Bayard, Nebraska, on July 14, 1896, heard evidence offered by each claimant concerning the respective claims made by the owners of the Chimney Rock, Nine Mile and Alliance canals; on the same day a claim on behalf of the Belmont canal was submitted without evidence. Said secretary was at Gering, July 17, 1896, where at office named in notice he heard evidence in support of claims severally filed for grantors of Ramshorn, and for owners of Winters Creek, Enterprise, Castle Rock, Minatare, Central and Farmers canals. All evidence taken on said respective claims was reduced to writing and made a matter of record in said secretary's office.

The evidence submitted by the Farmers Canal Company was received and recorded by said secretary, being the testimony of witnesses C. W. Ford, A. B. McCoskey and W. H. Wright. [The same (copied in full in the stipulation) is abstracted in the answer of the Winters Creek Irrigation Company. A concise statement thereof appears there, *supra*, at pages 14 and 15.]

Printed Record, pages 255 to 259.

72nd. No order continuing said hearings had on the 14th, 15th, 16th and 17th days of July, 1896, or any thereof to any subsequent time or place was applied for, made or entered; nor was any announcement made or notice given that any of said claims would again be considered or heard by said board, its secretary or any of its officers. No other hearing with reference to any of said claims was ever applied for, ordered or held, except the owners of Steamboat, Castle Rock, Belmont and Alliance canals on their several applications had rehearings later than April 7, 1897, without notice to others.

73rd. The blank form of "claim for waters of the state of Nebraska" received by the Farmers Canal Company as filled out and verified by Wm. H. Wright, its president, was filed in office of the secretary of said board September 19, 1896. No notice of said filing was given by said company, said board or its secretary or any officer thereof, to any party to this action or to any other claimant of water from said river. No other litigant or claimant then had or for many years thereafter did have any actual knowledge of said filing. Said "claim" is copied in full in the record.

Printed Record, page 260.

Concise Synopsis of Claim of the Farmers Canal Company.

I, Wm. H. Wright, of Scottsbluff county, Nebraska, on oath say:

1st. Claimant's name is The Farmers Canal Co., of postoffice address No. 517 New York Life Bldg., Omaha, Nebraska.

2nd. The water is claimed for irrigation, water power, domestic and other useful purposes.

3rd. Name of canal is the Farmers canal.

4th. Source of appropriation claimed is the North Platte river.

5th. The amount of the appropriation claimed is 275,000 miners' or statute inches.

6th. The headgate is on north bank of the stream in sw $\frac{1}{4}$ of se $\frac{1}{4}$ of section 3, township 23 north, of range 58 west of the 6th p. m.

7th. Said canal, 81 miles in length, passes through following sections of land shown on accompanying township plats. [Here follows description of land.]

(a) The portion of said canal 19 miles long indicated on said plats by a black line is completed half size.

(b) The portion of said land 62 miles in length indicated on said plats by red line is not completed.

8th. Dimensions of said canal are (and will be for the uncompleted portions) as follows: Headgate .. in clear .. 136 ft. (completed); depth of water on floor at low water ft. [Then on the blank form is tabular statement intended to show location, depth, width on bottom, width on top and grade per mile at sundry places below the headgate. All that tabular matter is left entirely blank, i. e., not filled out to give the information called for by the blank form.]

9th. The total excavation amounts to about 3,125,000 cubic yards of material, consisting of soil, hard pan, gravel and soft rock; the total length of fluming required is about 150 ft.

(a) The material thus far removed amounts to about 600,000 cubic yards.

(b) The fluming completed amounts to . . . ft.

10th. Estimated cost of said canal is: Earth work, \$250,000; fluming, \$5,000; headgate, \$8,000; other expenses, \$7,000; total, \$350,000.

(a) The expenditures thus far incurred are as follows: Earth work, \$72,000; fluming, \$.....; headgate, \$8,000; other expenses, \$18,000; total, \$98,000.

11th. It is the intention that said canal shall supply water to irrigate the following sections or quarter sections of land, viz.: All the lands shown and designated on the plat herewith filed and marked exhibit A on the inside of the red shaded lines, the line of the Farmers canal being shown by the black and scarlet lines. These are to be used in ditches built or partly so, amounting in all to 70,000 acres.

12th. The actual work of excavation and construction was begun on the day of, 1...., and the works completed, and the appropriation perfected on or before the day of, 1....

(a) This claim is made under rights deemed to have been acquired by

(b) Water turned into said ditch or canal on or before the day of, 1....

13th. The time estimated as necessary to provide for the completion of the amount of water herein claimed and the beneficial use above stated, is five years from April 4, 1895.

(c) There were acres of crops actually irrigated from said ditch or canal during 1....

(d) It is estimated there will be acres of crops irrigated from said ditch or canals during 1....

14th. The relation which the subscriber hereto bears to said canal is that of president; he is authorized to make this affidavit in behalf of the interests affected.

Said claim for the waters of the state of Nebraska, signed by Wm. H. Wright, has jurat attached showing it was verified by him September 15, 1896. Endorsed thereon are the words "Claim No. 323. Priority No., Division No. 1-A, District No. Claim for the waters of the state of Nebraska. There is also endorsed over signature of "W. R. Akers, State Engineer, Secretary," a certificate showing that it was filed for record in his office at 9 A. M. September 19, 1896, and duly recorded in book of the record of claims for the appropriations on page Attached to said document are township plats showing on their obverse and reverse sides certain black and scarlet lines.

Printed Record, between pages 260 and 261.

74th. The secretary of said state board of irrigation on January 7, 1897, rendered an opinion on said claim of The Farmers Canal Company, made the same a matter of record in his office, and forwarded a copy thereof to said company; but no copy or notice of said opinion or of its

rendition was ever at any time sent or given to any other claimant for water from said river. [Said opinion is copied in full in printed record.]

Synopsis of Secretary's Opinion in re The Farmers Canal.

This claim is for a right to use a part of the water of the North Platte River for irrigation; it is made by virtue of posting three notices of appropriation at the proposed point of diversion, the first on September 16, recorded September 19, 1887, the second on November 17, 1890, the third on March 12, 1895, and by beginning work upon a proposed ditch about March 1, 1888.

It appears from the record in this matter:

1st. The name adopted for the ditch is "Farmers Canal."

2nd. The source of its appropriation is the North Platte river.

3rd. The object thereof is irrigation of lands.

4th. Actual construction work thereon began about March 1, 1888.

5th. Its priority dates from September 16, 1887, when said first notice was posted.

6th. The priority number of said appropriation for said water-shed is No., Water Division No. 1-A; for said stream No., North Platte River.

7th. Said ditch heads on north bank of said stream at point (specially described).

8th. Said ditch is about 81 miles long and passes through lands (described in detail).

9th. Said canal covers and reclaims following lands: (Then follows description by government sub-divisions of about 80,000 acres.)

The claim is allowed subject to the following limitations and conditions, viz.:

1st. The water appropriated shall be used for the purpose of irrigation.

2nd. The time for completing the application of water to the beneficial use indicated shall extend to September 1, 1904.

3rd. The amount of the appropriation shall not exceed 1,142 second-feet, nor the capacity of said canal, nor the least amount of water experience may hereafter indicate is necessary to produce crops in exercise of good husbandry and further under any circumstances, it shall be limited to one-seventieth of one second-foot for each acre of land to which water has been actually and usefully applied on or before September 1, 1904.

Said opinion is signed W. R. Akers, state engineer, secretary, and bears date January 9, 1897. The docket number of said opinion is 918.

Printed Record, pages 261 to 266.

Paragraphs 75 to 81½, inclusive, pertain to the rendition and filing by said secretary in his office at Lincoln of opinions as to canals of eight plaintiffs in error, similar, *mutatis mutandis*, to the opinion in case of said Farmers canal. For convenience, the substance of said paragraphs and opinions is here tabulated in two tables.

<i>Name of Canal.</i>	<i>Docket Number.</i>	<i>County of Posting.</i>	<i>Date of Filing Opinion.</i>
Enterprise	920	Scottsbluff	Jan. 7, 1897
Minatare	919	Scottsbluff	Jan. 7, 1897
Castle Rock	921	Scottsbluff	Jan. 7, 1897
Central	926	Scottsbluff	Jan. 7, 1897
Nine Mile	925	Scottsbluff	Jan. 8, 1897
Winters Creek	952	Scottsbluff	Jan. 13, 1897
Ramshorn	245	Scottsbluff	Jan. 26, 1897
Browns Creek	857	Cheyenne	Jan. 28, 1897

<i>Name of Canal.</i>	<i>Priority Date.</i>	<i>Acre-</i>	<i>Second-</i>	<i>Time for</i>
		<i>age.</i>	<i>Feet.</i>	<i>Completing Application.</i>
Enterprise	March 28, 1889	12,160	173	Sept. 1, 1900
Minatare	Jan. 14, 1888	17,460	249	Sept. 1, 1899
Castle Rock	April 18, 1889	5,780	82	Sept. 1, 1900
Central	June 23, 1890	2,500	36	Sept. 1, 1900
Nine Mile	Dec. 16, 1893	14,000	200	Sept. 1, 1900
Winters Creek..	Oct. 18, 1888	8,700	124	Sept. 1, 1899
Ramshorn	March 20, 1893	3,200	45	Sept. 1, 1899
Browns Creek..	Jan. 20, 1892	13,000	188	Sept. 1, 1902

Total.....76,800 1097

The stipulation referring to each said opinion shows that a copy thereof was sent only to the claimant of the canal named in each instance, and that no notice of the rendition of any such opinion was sent to any party other than claimant or its agent.

Printed Record, pages 266 to 280.

82nd. Said state board of irrigation on April 7, 1897, without sending any notice to and without knowledge of any claimant—other than such constructive notice, if any, as may be imputed by law—caused to be entered on its records a resolution, which insofar as it pertains to the opinions referred to *supra* is:

Affirming Resolution of State Board.

“Office of State Board of Irrigation,
Lincoln, Nebraska.

April 7, 1897.

The State Board of Irrigation met at the office of the secretary.

Present:

Governor S. A. Holcomb, President.

J. V. Wolfe, Commissioner of Public Lands and Buildings.

E. P. Smith, Deputy Attorney General.

Secretary W. R. Akers stated that he had passed upon 316 cases since the last meeting of the Board, from which no appeals had been taken.

Upon motion of E. P. Smith the findings of the Secretary from which appeals were not taken were affirmed in the following cases:

Docket No. 819, Chimney Rock Irrigation Canal & Water Power Company, Cheyenne County; affirmed.

Docket No. 832. Belmont Irrigating Canal & Water Power Company, Cheyenne County; affirmed.

Docket No. 918. Farmers Canal Company, Scotts Bluff County; affirmed.

Docket No. 919. Minatare Mutual Canal & Irrigation Company, Scotts Bluff County; affirmed.

Docket No. 920. Enterprise Ditch Company, Scotts Bluff County; affirmed.

Docket No. 925. Nine Miles Canal & Reservoir Company, Scotts Bluff County; affirmed.

Docket No. 926. Central Irrigation Canal & Water Power Company, Scotts Bluff County; affirmed.

Docket No. 945. Carrol Nichols, Yorick Nichols, Scotts Bluff County; affirmed.

Docket No. 952. Winters Creek Irrigation Company, Scotts Bluff County; affirmed.

Docket No. 857. Browns Creek Irrigation Canal Company, Cheyenne County; affirmed.

W. R. Akers,

State Engineer, Secretary.

Approved: Silas A. Holcomb."

The stipulation states:

"(Castle Rock claim seems to have been finally approved on September 22, 1897.)"

Printed Record, pages 280 and 281.

83rd. Neither said state board or any officer thereof notified any claimant or appropriator of the adoption of said resolution, nor did any plaintiff in error acquire any knowledge or information about it until several years after its adoption.

Paragraphs 84th, 85th and 86th state the rendition of opinions by J. M. Wilson (successor of W. R. Akers as secretary of said board) concerning canals of three other plaintiffs in error, severally owners of the Belmont, Alliance and Chimney Rock canals, with like averments as *supra* concerning copy of each opinion being sent only to the claimant named therein. We present in two tables the substance of said opinions:

<i>Name of Canal.</i>	<i>Docket Number.</i>	<i>County of Posting.</i>	<i>Date of Filing Opinion.</i>
Belmont	828	Cheyenne	Aug. 10, 1898
Alliance	874	Cheyenne	Aug. 12, 1898
Chimney Rock	844	Cheyenne	Sept. 13, 1898

<i>Name of Canal.</i>	<i>Priority Date.</i>	<i>Acre-Second-Completing age. Feet. Application.</i>
Belmont	Dec. 19, 1889	35,000 270 Sept. 1, 1900
Alliance	Dec. 26, 1892	7,000 100 Sept. 1, 1900
Chimney Rock....	Dec. 3, 1890	6,750 60 Sept. 1, 1899

Total.....48,750 430

Printed Record, pages 281 to 287.

87th. Said state board of irrigation, on January 2, 1889, with like lack of notice, caused a like resolution to be entered affirming said secretary's opinions on said three claims last tabulated herein.

88th. [This paragraph is same as 83rd, save that it refers to said last resolution.]

89th. No copy of any of said claims, opinions, or resolutions was ever forwarded by said board or any officer thereof to any county clerk. No certificate of said board or any of its officers containing the name or postoffice address of any claimant, the priority of its appropriation, the amount of water appropriated by it, the amount of prior appropriations, or any other information relative to any said claim, opinion or resolution was ever transmitted to any county clerk. No such document was ever filed or recorded, except that a copy of said opinion pertaining to the Farmers canal was filed for record with county clerk of Scottsbluff county by successors in title to the Farmers Canal Company on December 27, 1905.

90th. The trustee because of failure of said Farmers Canal Company to pay either interest or principal of the bonds it had sold, began suit in U. S. circuit court for Nebraska in 1898 to foreclose said trust deed; in said suit, decree was entered ordering sale of said Farmers canal and all other property of said company. On December 23, 1901, all said property was sold under said foreclosure decree to one Roberts Walker, who received confirmed master's deed in February, 1902. The descriptive clause in said deed covers everything possible to be conveyed of property formerly owned or to be acquired by the Farmers Canal Company with special reference to its canal, and everything possible to have been or thereafter to be acquired by virtue of its construction, including whatever appropriation and water rights it had or might secure by further construction, extension, development, etc.

Printed Record, pages 287 to 289.

One Wm. Frank, on April 14, 1902, filed in the office of the secretary of said state board of irrigation his application for a permit to appropriate for irrigation 2,000 second-feet of water from said river, proposing to construct a canal 150 miles long to irrigate 150,000 acres, stating a point of diversion and proposed line in substance the same as that of the Farmers canal. Protests against said application were filed by the Farmers Canal Company and said Walker, who claimed to have a prior appropriation to irrigate the same land described in said Frank's application so far as it is irrigible for about 80 miles from the headgate. The Farmers Irrigation District intervened in said matter by filing with said state board its petition (here condensed) viz.:

INTERVENTION PETITION OF FARMERS IRRIGATION
DISTRICT.

Before Said Board.

In re Application 660 of William Frank.

1. Intervenor The Farmers Irrigation District shows a proceeding is now pending before said board *in re* application 660 of Wm. Frank filed April 14, 1902, to appropriate waters of North Platte river. In said proceeding The Farmers Canal Company and Roberts Walker, who have an appropriation allowed, contest the right of said Frank to appropriate water to irrigate land included in the appropriation granted to said company and Walker on the ground that they have a prior appropriation therefor. Said Frank contests said appropriation on the ground that its owners have not completed their canal with necessary diligence and have hence forfeited said appropriation, except so much thereof as is needed to irrigate 5,000 acres, which is all the land susceptible of irrigation from their Farmers canal.

2. Intervenor, an irrigation district organized under article 3 of chapter 93a Nebraska statutes, to construct and operate a canal to irrigate land, comprises about 50,000 acres which can be irrigated by making a canal to take water from said river in Scottsbluff county. Said land is described in its

application 675 filed in June, 1902; it is also included in application 660 of said Frank, also in the appropriation of water allowed by this board to said company and Walker.

3. To construct and operate its canal, intervenor has authorized issuance of its bonds for \$400,000, being sufficient to enable it to perform all its functions. Said bonds have been duly validated by the supreme court of Nebraska. All that is necessary to enable it to construct its said canal is a water appropriation for which it has so filed. There is unappropriated water in said river sufficient for its purpose.

4. Said canal of said company and Walker originally was intended to irrigate said land in intervenor district and to be about 70 miles long. Said owners never completed it to enable it to irrigate said land. Said owners for more than five years have abandoned its construction; since their appropriation was allowed, more time has elapsed than was needed to complete the canal. Its owners have wholly abandoned construction of that part thereof needed to enable them to irrigate said land. By their neglect so to do, their right to extend said canal to appropriate water allowed them to irrigate said land has long since been forfeited.

5. Said canal as now constructed only for its first 20 miles, permits no more water to flow therein than is needed to irrigate not more than 5,000 acres lying immediately under its upper portion above intervenor district.

6. Said state board did not grant to the owners of said canal until January 1, 1904, to complete it; but did grant them until that date to apply water. Said board had no power or authority to extend the time conceded by statute in which to construct the canal, i. e., the statute requirement that excavation work be begun within six months after an application is approved, and be continued diligently to completion unless temporarily interrupted by some unavoidable or natural cause. No such causes are present in this instance.

7. Said Wm. Frank, whose application 660 includes lands in intervenor district and application, does not reside in any county through which he

proposes to construct his canal; he is without means to do said work. He made said application to exploit the territory described for speculation; since filing same, his efforts have been not to construct, but to sell. To grant him an exclusive appropriation to irrigate land in intervenor district will be against the public weal.

That part of section 28, article 2, chapter 93a of Nebraska statutes, prohibiting the grant of water for land where a prior application has been allowed is void, because unconstitutional and assuming to confer upon such grantee an irrevocable grant of a special privilege; also because it deprives land owners of the right to construct canals to irrigate their lands and thereby deprives them of the use of their land without due process of law.

The prayer is that intervenor may be made a party and permitted to contest the appropriation of said company and Walker, also to protest application 660 of said Frank; that on final hearing such part of said appropriation as covers lands in intervenor district may be held to have been forfeited and be cancelled; that said application 660 of said Frank be disallowed as to the lands therein mentioned included in intervenor's application; or, if it be decided not against public welfare to allow said Frank's application for such lands, that intervenor be also allowed its application for water for its lands; in any event, that it be allowed its application as filed, and such other relief as justice may require.

Said intervention petition subscribed by its attorneys was verified by the president of said district August 11, 1902.

Printed Record, pages 289 to 293.

Said board on hearing of said protests denied said Frank's application for permit, in so far as it sought to affect land to be supplied by lateral ditches from the upper 80 miles of the Farmers canal or extension thereof. Later the supreme court of Nebraska (on error to the district court, to which said matter had been appealed), in its case 13,370, wherein said Farmers Irrigation District was plaintiff in error and said Frank, said Walker and the Farmers Canal Company were defendants in error, rendered judgment (here condensed) :

Judgment of Nebraska Supreme Court in Said
Frank Case.

On full consideration of this cause, the court doth find error apparent on the record in the judgment of the district court. It is therefore ordered that said judgment be reversed and said cause remanded to said district court, with instructions to enter judgment in favor of the Farmers Canal Company and to remand the application of Wm. Frank and the Farmers Irrigation District to the state board of irrigation with leave to amend if desired, and for further proceedings in accordance with opinion filed herein this day. Said Frank must pay costs incurred severally by said district and said Farmers Canal Company.

Printed Record, pages 293 and 294.

901½th. The district court of said Scottsbluff county on November 18, 1904, pursuant to mandate from said supreme court in said Frank litigation, rendered its judgment (here condensed):

District Court Judgment in Frank Case.

On this day in term said causes heretofore consolidated both in this court and on appeal in the supreme court come on again for hearing and entry of judgment to accord with mandate of supreme court.

This court in accord with commands of said mandate finds in favor of the Farmers Canal Company and Roberts Walker and against the Farmers Irrigation District and against Wm. Frank, in so far as the application of said Frank to the state board of irrigation for the right to take water from the North Platte river conflicts with the claim of said company and Walker. It finds in favor of said Frank and against said district and dismisses the appeals of said Frank and district so far as they relate to the Farmers Canal Company. The findings and jurisdiction of said state board so far as it finds that said Walker as successor in interest of said company, is entitled to an amount of water from said river not to exceed 1,142 second-feet, is hereby ratified and affirmed. The finding of said state board relating to the priority of said company and Walker as its assignee is also affirmed.

It is therefore decreed that said Walker as said assignee has appropriated and is entitled to divert from said river for irrigation purposes 1,142 second-feet of water, and has a vested subsisting right in and to said appropriation (describing the point of diversion); and that the priority thereof dates from September 16, 1887.

It is further decreed, pursuant to said mandate, that the application of said Frank be and it is remanded to said state board with leave to amend his application if he so desire, without losing his right of priority.

It is further decreed that the application of said Farmers Irrigation District is remanded to said state board with leave to amend the same, also that costs in this court on appeal, as well as the costs in the supreme court, be taxed to said district and Frank in accord with said mandate.

Printed Record, pages 294 and 295.

91st. The Tri-State Land Company since January, 1904, has been a duly organized corporation under laws both of Nebraska and New Jersey, with powers ample to cover everything stated *infra*. Its capitalization is 1,600 shares, par value \$100 each.

On February 24, 1904, one Leavitt, representing a committee of said company, contracted with said Walker to buy from him all the property acquired by him by master's deed referred to *supra*. By terms of said agreement, \$60,000 was to be paid to said Walker if the Nebraska supreme court in said Frank case should affirm the adjudication of said state board made in 1897 *in re* said Farmers canal and should hold that said Walker had all the rights of said Farmers Canal Company to 1,142 second-feet of water with priority date September 16, 1887.

Said contract also provided that said Tri-State Land Company should pay Walker for said property only \$21,000, if said supreme court should affirm the decision of the district court in said Frank case, to effect that said Farmers Canal Company and its assigns are entitled only to so much water from said river as should be sufficient to irrigate the acreage under that part of said Farmers canal then completed.

On signing said contract said Tri-State Land Company paid to said Walker \$21,000; later when said Nebraska supreme court handed down its opinion in said Frank case, said company paid to said Walker \$39,000 more (thereby completing payments called for by said contract) and received from him conveyances of title; also a quit claim deed from the Farmers Canal Company and another from the committee representing all its stockholders and bondholders. Said deed from Walker was recorded in Scottsbluff County, February 21, 1905.

Printed Record, pages 295 and 296.

92nd. Said Tri-State Land Company had said Farmers canal re-surveyed and in August, 1905, it began its reconstruction and enlargement and to excavate, re-construct and enlarge that portion below the 19 miles through which water had theretofore been conducted. The entire capital stock of said company of face value of \$1,600,000 has been issued and is now outstanding. The proceeds of sales of said stock with other large sums borrowed have been expended in construction, operation and maintenance of said canal, *inter alia*, in items as follows:

(1) In 1905, said company paid for re-survey, reconstruction, machinery, tools and labor, \$133,066.46;

(2) In 1906, it did as follows: Began to enlarge the 19 mile upper part of said canal, during summer of that year and the following winter it continued said enlargement, so in the spring of 1907 said canal was made of its full size for 40 miles below its headgate. Said company on September 13, 1906, applied for leave (granted by said state board) to construct a needle dam across said river below the head of said canal; in October it procured material and caused work to be done under contract to construct said dam, on which it expended \$8,000 during that year, and further in enlarging, constructing, deepening and widening the canal itself, \$449,491.87.

(3) In 1907, said company built a new and substantial headgate of concrete and reinforced steel, expending there-

on \$52,113.48. It also began construction of a wastegate or spillway of structural steel below the headgate to clarify water before turning it into the canal; it completed the same in August, 1908. It also extended said canal to full capacity easterly about 20 miles further, expending in such construction and upon the needle dam and wastegate, \$271,273.39, making its total outlay for construction in 1907, \$323,386.87.

Said canal at close of said year was completed for 60 miles easterly from its headgate; it was then capable of irrigating 60,000 acres.

Printed Record, pages 296 and 297.

93rd. In 1908, said company completed its wastegate or spillway, prosecuted work on its needle dam, extended said canal 10 miles further, making its total expenditures for construction work that year, \$52,410.67.

In 1909, it extended said canal 10 miles further to a point within five or six miles from the terminus described *supra* in the claim filed by the Farmers Canal Company with said state board, expending during said year in such extension, work on its needle dam, and other projects connected with the canal building, \$464,535.13, so at close of that year said canal was capable of irrigating all the land described in the opinion of the secretary of said state board on said claim.

In 1910, said needle dam was completed in March; during said year said company expended on said dam, laterals and other construction work, \$198,529.70.

Cost of said structures as a whole was as follows:

Of said needle dam.....	\$ 27,869.20
Of said headgate.....	52,113.20
Of wastegate	42,253.46
On work on canals, laterals, bridges, culverts, tools, machinery and labor	1,551,138.44

Total expenditures to Oct. 31,
1910\$1,673,374.30

During 1908, 1909 and 1910, said Tri-State Land Company constructed a system of laterals from its main canal to cover practically all the land described in said secretary's opinion *in re* The Farmers canal. The amounts above referred to do not include the purchase price thereof, survey, re-surveys, operation, superintendence, interest, attorney's fees and overhead expenses.

Printed Record, page 297.

94th. Before this suit was begun, said Tri-State Land Company entered into contract with the Farmers Mutual Canal Company, whereby the former agreed to sell to the latter its canal, water rights, appropriations and franchises. Later said property was conveyed to said purchaser in consideration for all its stock, i. e., 80,000 shares, the majority whereof said Tri-State Land Company still owns and controls, having sold to parties under its canal some 25,000 shares. The legal title to said canal, water rights and franchises is now in the Mutual Canal Company.

Printed Record, pages 297 and 298.

95th. The average flow of said river during the last half of July and throughout August, September and October, to the headgate of said canal does not exceed 800, and frequently runs as low as 300 second-feet. If no water were diverted, said flow would continue about the same in passing all headgates involved in this suit. During said months in 1910, the diversion into said Tri-State canal was from 300 to 400 second-feet, which at times exhausted all the water flowing to its headgate. One measurement was made by an engineer during said diversion of all said water. He then estimated the quantity of water which came to the surface and flowed in said river further down, with following results:

At Ramshorn headgate, 79.43 second-feet, out of which said ditch diverted and received 45.

At headgate of Enterprise canal, 59.2, out of which the latter diverted 49.9 second-feet.

At headgate of Winters Creek canal, 80, out of which the latter diverted 50 second-feet.

At point two miles below Winters Creek headgate, 117 second-feet, all of which, with other accretions below, were needed and used by other ditches mentioned herein so far as the supply permitted, some of said ditches receiving no supply, though needing the same for irrigation purposes.

The accretions which come to the surface of said river below said Tri-State dam vary at different places and in different times at the same place.

Said state board of irrigation on July 21, 1910, caused all headgates of every party hereto except that of the Farmers or Tri-State canal to be closed so as to cause all water in said river below the Tri-State dam to flow down to a prior appropriator near North Platte. Some headgates remained open for a few weeks because of temporary injunctions, on the dissolution of which they (with those before shut down) were kept closed until the end of the irrigating season. Said board allowed the owners of Farmers canal to divert water throughout said season under color of the rendition of the opinion of its secretary and its affirmance in 1907, referred to *supra*. Said state board in controlling said stream treats said Farmers canal as having a priority earlier than that of any other litigant here, to divert 1,142 second-feet to extent needed for irrigation thereunder on basis of one-seventieth of a second-foot per acre.

Printed Record, pages 298 and 299.

96th. Unless enjoined, they (defendants in error) will each irrigation season hereafter divert into their said canal, not exceeding 1,142 second-feet, so much water as they find necessary on said basis of irrigating land thereunder, even though all the water flowing in said river to their headgate is so diverted, and every other litigant be deprived of the use of any water.

97th. The land under the canal of each litigant when irrigated has raised diversified crops, i. e., the various kinds of grains, cereals, alfalfa, hay, potatoes and vegetables; also for four years last past, sugar beets. Alfalfa, sugar beets, potatoes and vegetables need irrigation in July, August and September. Said land is in a high state of cul-

tivation. It is owned in severalty by farmers, each having a tract varying from 10 to 320 acres. The owners of the smaller farms have for several years been engaged in intensive farming, i. e., the raising of small fruits and vegetables; those having larger tracts have been raising alfalfa, potatoes and sugar beets. Trees and shrubbery now in good growing condition are on many of said farms. The most profitable crops are those needing irrigation during July, August and September. If during said months any of said canals cannot divert water as needed, said farmers, stockholders of the affected litigants, must cease to raise the crops then needing irrigation and be compelled either to grow crops needing irrigation only during the earlier months or to purchase use of reservoir water at added expense.

Printed Record, pages 299 and 300.

Attached to said stipulation is a plat showing the part of North Platte river referred to, lines of the several ditches, their headgates, courses, etc.

Printed Record, between pages 300 and 301.

Said stipulation of facts was duly signed by the respective litigants through their attorneys and was all the evidence introduced in the case. It was taken as a bill of exceptions when the case reached the supreme court of Nebraska. As such, it was duly approved and settled by the trial judge.

Printed Record, pages 300 to 302.

SYNOPSIS OF FINDINGS AND DECREE IN TRIAL COURT.

The trial court (district court of Scottsbluff county, Nebraska) on January 22, 1912, in term, made, rendered and entered on its journal certain findings and decree, which following title of the case, after reciting submission of the cause on the pleadings and stipulation of facts in lieu of evidence, and that the court having heard argument of counsel, taken the cause under advisement, read the briefs of counsel and authorities cited, and being now fully advised, makes the following

FINDINGS OF FACT.

The first fifteen findings constitute an epitome of stipulated facts concerning the several canals referred to without reference to the proceedings before the state board, except that the 14th and 15th findings refer to the permits granted by that board for construction of the Steamboat and Gering canals. For ready reference we tabulate the findings and pages of printed record in their order:

<i>Number of Finding.</i>	<i>Name of Canal.</i>	<i>Page of Printed Record.</i>
1	Farmers or Tri-State.....	190 to 192
2	Minatare	192
3	Winters Creek	192
4	Enterprise	192 and 193
5	Castle Rock	193
6	Belmont	193 and 194
8	Central	195 and 196
9	Chimney Rock	196
10	Alliance	196
11	Browns Creek	196 and 197
12	Ramshorn	197
13	Nine Mile	198
14	Steamboat	198
15	Gering	198

The 7th finding pertains to the Mitchell canal, which heads in said river in Wyoming a short distance west of the Nebraska line.

Printed Record, pages 194 and 195.

The 16th finding concerns the relative order of heads of said canals which, including the Mitchell (whose owner is not here a litigant), we here for convenience tabulate:

<i>Name of Canal.</i>	<i>County.</i>	<i>Distance Below Headgate of Next Upper Canal.</i>
Mitchell	In Wyoming	Nearly 1 mile west of state line
Gering	Scottsbluff	1 mile
Farmers or Tri-Statte ..	Scottsbluff	1/4 mile
Ramshorn	Scottsbluff	3 miles
Enterprise	Scottsbluff	5 miles
Winters Creek	Scottsbluff	12 miles
Central	Scottsbluff	3 miles
Minatare	Scottsbluff	6 miles
Steamboat	Scottsbluff	1 1/2 miles
Nine Mile	Scottsbluff	5 miles
Chimney Rock	Scottsbluff	8 miles
Alliance	Morrill	2 miles
Belmont	Morrill	6 miles
Browns Creek	Morrill	8 miles

Printed Record, pages 198 and 199.

The 17th finding pertains to proceedings before the state board of irrigation. It is divided into 15 subdivisions here concisely stated.

(1) There were filed with secretary of state board of irrigation on May 31, 1895, transcripts of the various notices which had theretofore been filed with the several county clerks; thereafter said secretary forwarded to each of the claimants named in said notices a form of claim with blanks in each to be filled out to give information required.

(2) Said blank forms as filled out were returned to said secretary's office by the parties litigant, here tabulated as to date of filing as follows:

<i>Name of Canal.</i>	<i>Date of Filing Claims with Said Secretary.</i>
Browns Creek	June 24, 1895
Chimney Rock	June 28, 1895
Castle Rock	July 5, 1895
Alliance	July 17, 1895
Nine Mile	Aug. 12, 1895
Central	Aug. 13, 1895
Winters Creek	Sept. 20, 1895
Belmont	Sept. 30, 1895
Ramshorn	Oct. 6, 1895
Enterprise	Oct. 15, 1895
Minatare	July 17, 1896

(3) On June 5, 1896, said secretary mailed a copy of the rules of said board and a notice to each party (except the owners of the Mitchell, Steamboat and Gering canals) or to its predecessor in interest. (Said finding recites substance of notice abstracted *supra* at pages 23 and 24.)

(4) No other notice was forwarded by said board or any of its officers to any party.

(5) The secretary of said board appeared and took evidence—stating times and places, etc.—as shown *supra* at page 37, being paragraph 70th of stipulation of facts.

(6) All evidence so submitted to said secretary was reduced to writing and preserved in his office. At said hearings the Farmers Canal Company had filed no claim. Though given 30 days in which to do so, it did not within the granted time. The evidence submitted in its behalf tended to prove that 19 miles and no more of its canal had been completed only to size heretofore stated; also that not more than 500 acres had been irrigated therefrom.

(7) Said Farmers Canal Company by its president, on September 19, 1896, filed with said secretary its claim, partially filling out the blank form, stating location of its head-gate, its length as 81 miles, the land it was said to traverse, referring to accompanying plats to show its line, viz.: (then follows excerpt from said statement of claim shown *supra* at pages 38 to 40, being in the 73rd paragraph of stipulation of facts.)

Printed Record, pages 200 and 201.

(8) No order was made continuing said hearings of July 14th to 17th to any later date. No notice was given that any of said claims would again be considered by said board, its secretary or any other officer. No other hearing on any of said claims was held except pertaining to the Steamboat, Castle Rock, Belmont and Alliance canals, about which hearings without notice to others were held after April 7, 1897.

(9) Said secretary on January 7, 1897, filed and entered of record in his office an opinion concerning said claim of the Farmers canal for—then follows substance of said opinion and conditions incorporated therein, not here repeated because the opinion is fully shown at pages 41 and 42, *supra*, being in 74th paragraph of stipulation of facts.

Printed Record, page 201.

(10) Said secretary filed in his office separate opinions—giving dates of said filings and short data as to each as tabulated at page 42 *supra*.

Printed Record, pages 201 and 202.

(11) Said board on April 7, 1907, without notice to or knowledge of any party to this action, entered of record a resolution affirming all the former's opinions filed prior to that date, and on January 2, 1899, another resolution affirming all opinions filed later than April 7, 1897, and prior to January 2, 1899.

(12) Promptly after filing each of said opinions by said secretary, he forwarded a copy thereof to the claimant named therein, but no copy or notice thereof was ever forwarded to any other claimant. No notice of either of said resolutions was ever given to any claimant. No party hereto acquired any knowledge thereof nor of any opinion so filed by said secretary regarding any claim except its own for several years after filing of said opinions and said resolutions.

(13) The Tri-State Land Company on December 27, 1905, secured a copy of said opinion of said secretary referring to the Farmers Canal Company, on which date it caused it to be filed for record with county clerk of Scotts-bluff county.

(14) No certificate as required by statute was by said board, through its secretary or otherwise, within 30 days or at any time after passage of either said resolution, issued or recorded to inform any claimant of the number of its priority date, or the amount of prior appropriations from said river.

(15) The opinions and resolutions mentioned *supra* constitute the only action taken by said board or its secretary concerning said claims.

Printed Record, page 202.

The 18th finding pertains to average flow of North Platte river from July 15 to November 1 of each year and states that during that period in 1910, the owner of the Farmers canal diverted all water at its headgate, thus preventing some litigants from obtaining any water and others from obtaining what their crops required. It also states that the state board of irrigation attempted to distribute water in 1910, in accord with said opinions of its secretary; in so doing, on July 21 it closed headgates of all canals except the Farmers and Mitchell to cause water to flow down to the headgate of an alleged prior appropriator, keeping some of said headgates closed for several weeks and the remainder to the end of the season, during all which time it permitted the owner of the Farmers canal to divert as much water as was that year needed to irrigate land thereunder; also that unless otherwise provided by this decree said board will permit the owner of said canal to continue such diversions as of senior date up to 1,142 second-feet when needed, even though by so doing all water flowing in said river is taken and all other litigants deprived of water.

The 19th finding is a general one on the issues joined for the plaintiff and respective cross-petitioners and against the owners of the Farmers canal (defendants in error herein) in so far as it is not inconsistent with any of the foregoing special findings.

Printed Record, page 203.

CONCLUSIONS OF LAW.

The court finds as conclusions of law:

1. Because the canal of The Mitchell Irrigation District heads and diverts water in Wyoming, this court has no jurisdiction over its cross-petition.

2. Proceedings of the state board of irrigation and its secretary *in re* claims for appropriations made or initiated prior to April 4, 1895, do not constitute a valid binding adjudication of the rights severally acquired by the parties.

3. Said Farmers Canal Company constructed its canal of capacity sufficient to irrigate 2,000 acres of land and applied water thereto with such diligence as to entitle its successors to sufficient water with priority dating September 16, 1887, to irrigate 2,000 acres, being 28.59 second-feet. Said company and its successors failed to complete said canal or to apply more water therefrom with sufficient diligence to entitle it to any larger priority except as subsequent, junior and inferior to those of all other parties to this suit.

4. If any appropriation in excess of water needed to irrigate 8,000 acres was ever acquired by said Farmers Canal Company or its successors of said early date, it has become lost by failure to apply the same to any beneficial use for a continuous period of more than 10 years.

Printed Record, pages 203 and 204.

5. The Minatare Mutual Canal & Irrigation Company and its predecessor in title constructed the Minatare canal of sufficient capacity and applied water to 9,150 acres with such diligence as to entitle it to a priority of date January 14, 1888, for enough water for said acreage, not to exceed 130.71 second-feet.

Conclusions of law numbered 6 to 17 pertain to the rights of appropriation acquired by the remaining litigants (plaintiffs in error). For convenience we present the same, together with conclusion of law 5 *supra* in tabulated form as follows:

<i>Name of Canal.</i>	<i>Irrigated Acres.</i>	<i>Priority Date.</i>	<i>Second-Foot Awarded.</i>
Minatare	9,150	Jan. 14, 1888	130.71
Winters Creek.	5,900	Oct. 1, 1888	84.28
Enterprise	7,883	Mar. 28, 1889	112.61
Castle Rock.....	5,780	Apr. 18, 1889	82.59
Chimney Rock...	5,976	June 12, 1889	85.37
Belmont	18,500	Dec. 19, 1889	264.28
Central	2,537.28	June 23, 1890	36.24
Nine Mile.....	5,906	Nov. 28, 1890	84.37
Browns Creek...	9,500	June 25, 1891	135.71
Alliance	7,000	Dec. 26, 1892	100
Steamboat	830	Oct. 22, 1895	11.86
Gering	14,621.24	Mar. 15, 1897	208.87

Total	93,583.52		1336.89
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Printed Record, pages 204 and 205.

DECREE PROPER.

It is therefore considered, adjudged and decreed by the court:

1. That the cross-petition of The Mitchell Irrigation District be dismissed without prejudice, for want of jurisdiction over its subject matter.

2. Said Farmers Mutual Canal Company, owner of the Tri-State canal and the users of water therefrom have an appropriation of sufficient water to be diverted from said river into said canal to irrigate 2,000 acres thereunder, not to exceed, however, 28.71 second-feet continually flowing during each irrigating season, nor the least amount that experience may hereafter indicate as necessary to produce crops on said 2,000 acres in the exercise of good husbandry. Said appropriation dates from September 16, 1887; the title of said company thereto is good and valid and is hereby quieted and confirmed in said company. All other parties to this action are hereby enjoined and restrained from asserting or maintaining any claim inconsistent therewith.

Printed Record, pages 205 and 206.

Paragraphs 3 to 15 next following are decretal orders, *mutatis mutandis*, as to the 13 canals of plaintiffs in error, corresponding as to acreage, priority dates and second-feet of water to the several findings concerning each, tabulated *supra* on last preceding page.

Printed Record, pages 208 and 209.

The 17th paragraph of said decree orders that each of said parties herein shall pay its own costs.

The owners of the Farmers canal (defendants in error here) each excepts to each and every finding of fact and conclusion of law above mentioned and to every provision of said decree except paragraph 1.

SUPERSEDEAS BOND was fixed at \$500 and 40 days from rendition of judgment allowed defendants owning Farmers or Tri-State canal to prepare and tender bill of exceptions. Said decree was signed by R. W. Hobart, district judge.

Printed Record, page 209.

JUDGMENT AND OPINION
OF THE SUPREME COURT OF NEBRASKA
IN THIS CAUSE.

The record shows appeal duly taken by the present defendants in error, as appellants from said district court decree, to the supreme court of Nebraska; that the same was advanced because of its public importance and that on October 18, 1912, said supreme court in said cause, being its number 17,522, rendered judgment (here condensed) as follows:

Judgment.

This cause coming on to be heard on appeal from the district court of Scottsbluff county, was argued and submitted; upon due consideration thereafter, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is therefore considered, ordered and adjudged that said judgment of said district

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court be and the same is hereby reversed and the cause dismissed, but without prejudice as to any controversy between the plaintiff and cross-petitioners; that appellants (the present defendants in error) recover from appellees their costs and mandate issue accordingly.

Printed Record, page 314.

OPINION.

On same day opinion of said supreme court of Nebraska in said cause was handed down—see *Enterprise Irrigation District vs. Tri-State Land Company*, 92 Neb. 121. The same (here condensed) is:

Syllabus.

1. Before the 1911 amendments to section 17, ch. 69, laws 1895, and under the irrigation act of 1889, ch. 68, laws 1889, one who has constructed a canal to carry water for hire usable on lands of others, and is ready and willing to furnish water to such land owners as will take it, has made the only application to beneficial use possible. His right to an appropriation continues as a developing one until all lands along the canal, for which the water was originally appropriated, use the same; provided—formerly—that it be applied within a reasonable time and—now—within the time limited by the statute.

2. The constitutionality of the irrigation act of 1895, its provisions creating the state board of irrigation and conferring on said board the right to determine priorities, reaffirmed; following *Crawford Company vs. Hathaway*, 60 Neb. 754, 61 Neb. 317, 67 Neb. 325; *McCook, etc., Co. vs. Crews*, 17 Neb. 115.

3. Where a statute authorizes a proceeding under the police powers affecting property rights without expressly providing for notice to the property owner, the right to notice is implied. Where proper notice has been given under a procedure authorized by the legislature, and the interested party has appeared, he is not deprived of any rights without due process of law.

4. The legislature has power to delegate formulation of rules of procedure before said state board. The failure to embody such method of procedure in the statute does not render due process lacking in the proceedings of the board.

5. In determining priorities of appropriation under said act of 1895, the transcript of posted and recorded notices transmitted by the county clerk to said state board constitute the "claims" for adjudication.

6. The limitation of 30 days for issuance of the certificate by said state board under section 21 of said Act of 1895, is merely directory. Such certificate does not constitute the adjudication, but is merely evidence thereof.

7. In determining priorities under sections 15 to 27 of said Act, said state board, although it might recognize and determine existing limitations, was without power to impose new ones.

8. Under the facts set forth in the opinion, the right of the Tri-State Land Company to an appropriation as successor in interest of the Farmers Canal Company and Roberts Walker, was not lost by lack of diligence, non-user or abandonment.

9. The posting and recording of notices and "claims" under the laws of 1889, ch. 68, held to be a public record with knowledge of which all interested parties were chargeable.

10. After it had been adjudged that said Walker had a valid appropriation of 1,142.86 second-feet, dating from September 16, 1887, the Tri-State Land Company bought all his rights; it then promptly began work of enlarging and extending the canal with diligence until its completion at cost of nearly \$2,000,000, including construction of a needle dam at large expense. There being in the summer an insufficient river flow to supply the needs of all the canals owned by the litigants, the plaintiffs by this suit begun in 1909, sought to have the relative priorities determined and to obtain decree settling their rights as superior to those of said Tri-State Land Company, except for about 28 second-feet, and to have such rights protected by injunction. *Held*, plaintiffs standing by with full notice and knowledge

of defendants' claim and permitting them to expend such sum without objection, without giving notice of plaintiffs' claims to seniority or beginning such suit for more than four years, creates an estoppel to maintain this action after substantial completion of the canal and works.

Printed Record, pages 315 and 316.

BODY OF THE OPINION.

In this somewhat condensed copy of the opinion, we subdivide it by "introduction" and with arabic numerals to designate those portions that cover the same numbers in the syllabus.

Introduction.

This suit was begun August 23, 1909, by the Enterprise Irrigation District, claiming appropriation of water from North Platte river on claim made by its grantor in March, 1889. Many other companies claiming appropriations from said river in Scottsbluff and Cheyenne counties are made defendants. On final framing of the issues, it appeared that plaintiff and each defendant except the Tri-State Land Company and the Farmers Mutual Canal Company were interested in having the prayer of the petition granted. Essentially the same relief is sought by each against the two defendants named, with one exception noted *infra*. Hence, hereafter the two latter named companies will be designated, defendants and all other parties, plaintiffs. The state board of irrigation and its secretary will be hereafter termed state board or secretary, as the case may be. No attempt will be made to set forth the pleadings in detail. The case was tried on said pleadings and stipulated facts, so all matters presented are practically questions of law.

The case may be summarized thus: Defendants claim an appropriation of 1,142.86 second-feet of earlier date to that of any plaintiff and an adjudication in their favor by said state board to said extent. Plaintiffs claim (1) such earlier appropriation never vested for more than 28 second-feet in the Farmers Canal Company or its suc-

cessors; (2) that by beneficial use of water by plaintiffs before construction of defendants' canal or their use of water, plaintiffs acquired prior right to all but 28 second-feet of what defendants claim; (3) if the Farmers Canal Company ever acquired an appropriation for the full amount claimed, it lost such excess by non-user for more than 10 years. Defendants assert the validity of their appropriation, its priority to any of plaintiffs, and deny its loss by non-user or abandonment. They further plead an estoppel due to plaintiffs standing by for years with knowledge of their claims, allowing them to expend large sums to carry out their enterprise without notice of any hostile or adverse claim until practical completion of their works. At close of the trial, the court found for each plaintiff and cross-petitioner (except the Mitchell Irrigation District) and by decree adjudged the respective appropriations and priorities without reference to the action of the state board in 1896 and 1897. Defendants were adjudged to have only 28.57 second-feet instead of 1,142.86 as claimed, with priority dating from September 16, 1887. Any excess over said amount, if ever acquired, it held was lost by failure to apply to a beneficial use throughout ten years. It further held it had no jurisdiction over the Mitchell canal because of its diversion in Wyoming, hence it dismissed its owner's cross-petition.

Printed Record, pages 316 and 317.

The opinion next contains an epitome of the stipulation of facts, more concise than that stated *supra* herein. [N. B. Said epitome contains no abstract of rules adopted by said state board or its secretary. Failure to conform to such rules was and is relied on by plaintiffs in error as denial of due process of law and of the equal protection of the laws.]

Printed Record, pages 317 to 323.

The questions involved are of the deepest importance not only to the parties actually now in court, but to every owner of irrigated land in Nebraska. Since the plaintiffs challenge all right and authority of said state board to ad-

judicate priorities under the act of 1895, if their contention be upheld, more than a thousand such adjudications made by that board since its first organization until now, in a period of over 16 years, are absolutely void. Moreover, whatever this court's conclusion may be, it is almost inevitable that one party or the other will suffer serious loss. We approach consideration of the questions here involved with deep sense of responsibility.

Appellants contend (1) the district court had no jurisdiction to establish priorities, that being exclusively for the state board; (2) that the rights of defendants were fixed by the state board in the Frank case as affirmed by this court and that a collateral attack thereon can be of no avail; (3) that there has been no forfeiture; (4) that by their conduct, plaintiffs are estopped to assert any right adverse to defendants' claim.

Printed Record, pages 323 and 324.

Plaintiffs contend defendants never acquired an appropriation for more water than allowed by the district court, because although the preliminary steps—posting and recording notices—were taken and the intention to apply water existed, yet the work was not prosecuted to completion with diligence and water in excess of the amount allowed by the district court was not conducted to place of intended use or applied within a reasonable time; also that the Farmers Canal Company had no vested appropriation when the irrigation act of 1889 was passed.

They argue

(1) Said board never made an adjudication intended to be final;

(2) It does not have power or jurisdiction to enter an order or decree conclusively establishing relative rights acquired prior to the act of 1895, because such "adjudication" requires the exercise of purely judicial powers, which said board does not and cannot possess; further, if it possesses judicial powers, the method provided by statute to adjudicate such right does not constitute due process of law;

(3) The manner and method followed by the board do not constitute due process of law, so its proceedings, so far as they purport to be conclusive, are void;

(4) The opinion in the Farmers Canal Company's claim is void as attempting to award an appropriation in excess of the claim made;

(5) This proceeding is not a collateral attack on the board's adjudication, but a direct attack on an order made in excess of jurisdiction;

(6) The proceedings of said board were so erroneous as to render it unconscionable to permit them to stand;

(7) If any appropriation in excess of 28 second-feet was ever acquired by defendants, it has been lost and forfeited by non-user;

(8) The mere fact that plaintiffs remained silent and did not assert any hostile claim is insufficient to constitute an estoppel;

(9) The opinion of said state board *in re* the Farmers Canal Company claim, did not purport to adjudicate a vested or complete adjudication for any definite quantity of water, but that company's right was by the opinion limited to water required for such lands as should be irrigated from its canal before September 1, 1905;

(10) To excise from the opinion said limitations and conditions, radically reconstructs it, thereby rendering it either void or to reach a result contrary to that intended and declared;

(11) If construed as an attempt to adjudicate a perfected appropriation of more than 7.15 second-feet, such excess is unsupported by any recorded statement of claim and evidence, hence was beyond jurisdiction of the board;

(12) If it be assumed the adjudication is valid, then by non-user for ten years thereafter of any water in excess of 28.57 second-feet, coupled with the use during that period by the other parties of all water in the river during low stages, there is a loss to defendants and a corresponding gain to plaintiffs by prescription, in the order of their priorities as settled by the trial court.

1.

Some plaintiffs argue with much force, there can be no vested appropriation until application to beneficial use of the water diverted. Decisions from Colorado and other states are cited to this view.

Counsel for owners of Belmont and Alliance canals takes a different view. Referring to the Act of 1889, he says: It was not its intent to encourage one to invest in an enterprise for the public good and then deprive him of his appropriation because land owners did not use the water in a specified time. That was provided by later legislation. Nothing in said Act requires use, to make the appropriation absolute. It provides that within a certain time after posting notice, construction work must begin and in good faith be carried to completion. By completion is meant conducting the water to place of intended use, i. e., such place on the canal line as the land owners desire to receive into their laterals. The 28th section of the Act of 1895 speaks of application to use, but that of 1889 does not. After a canal was constructed under said earlier act and water was conducted through it, if the canal owner stood ever ready to carry water for such land owners as would take it, he made the only application he could make or was required of him by the Act, so his right to the appropriation continued as a developing one until all lands under the canal were using water, "and thereupon ripened into a complete appropriation."

Counsel for other plaintiffs also concedes that in some states by statute, an appropriation is treated as effected when the works are completed, the water is available for use and there are lands reached by the system ready for tillage by its occupants. In other states by statute, the appropriation is not deemed complete before beneficial use; such was the rule prior to legislation.

Printed Record, pages 325 and 326.

The court then refers to sections 8, 9 and 10, ch. 68, laws of 1889, defining appropriation and completion of work. It then says the subject is also considered in mono-

graphic note to Nevada Ditch Co. v. Bennett, 60 Am. St. 777, 816, and quotes therefrom a similar statement to that of counsel for owners of Belmont and Alliance canals *supra*. In said quotation from said note, the prerequisites of a completed appropriation are stated to be (1) construction of *necessary works to divert and carry water to place of intended use*; (2) its *actual carriage thither or readiness* so to do. (Italics ours.) The point is further discussed in Sowards v. Meagher, 37 Utah 212 (108 Pac. 1112, 1117). This court has repeatedly said that a canal company is a *quasi* public service agency, acquiring the right by appropriation to divert water, on charging reasonable fees for its carriage to the lands whereon its use is designed, citing Paxton, etc. Co. v. Farmers, etc. Co., 45 Neb. 848; Castle Rock, etc. Co. v. Jurisch, 67 Neb. 377; McCook, etc. Co. v. Crews, 70 Neb. 115. Without further discussion, we are content to adopt the views of counsel for said Belmont and Alliance canal owners as to what constitutes an appropriation by a canal owner who is a carrier of water to land of others, with the reservation that water must have been applied—formerly—within a reasonable time—now—within time limited by statute. Comp. St. 1911, ch. 93a, art. 2, sec. 18.

Printed Record, page 326.

One of the principal questions argued concerns the validity and effect of the proceedings of the state board when it undertook to adjudicate priorities under the command of section 16, ch. 69, laws 1895 (Ann. St. 1909, sec. 6795). The provisions of said statute and the order made upon the "claim" were all set out in opinion in Farmers Canal Company v. Frank, 72 Neb. 136. We there held: The powers of said board under said section are *quasi* judicial; an adjudication by it of an appropriation made before taking effect of the act of 1895, after proper notice, is final unless appealed from, and cannot be collaterally attacked. That case was an appeal from an order of the board refusing two applications because appropriations were already in existence for the same lands. We then de-

cided in effect that in a matter properly before it, the board had allowed an appropriation as claimed and was concluded by its own prior order and adjudication.

We are now asked to re-examine this doctrine. Since in that case but a few pages of the briefs were devoted to discussion of this question and but a short time devoted thereto in oral argument, we have considered and will discuss the contentions now so earnestly made.

2.

It is first urged said state board has no jurisdiction to enter such order or decree because under the constitution the government of the state is divided into legislative, executive and judicial departments, and no person or collection of persons in one shall exercise any power belonging to either of the other departments except as heretofore expressly directed or permitted.

Printed Record, pages 326 and 327.

The same contention was first made in this court in *Crawford Co. v. Hathaway*, 60 Neb. 754. The decision turned on another ground, but in the opinion, after showing the then appellant based its rights solely on the irrigation act of 1895 (Comp. St. 1897, ch. 93a), without which neither appellants or cross-petitioners would have any right to the water in question, unless the act of 1877 had abrogated common law riparian rights, we said: If said act of 1895 is valid, the trial court was correct in refusing to determine priority rights, since said act gives exclusive original jurisdiction on that subject to the state board, which had not acted. But appellant contends, that part of said act which creates a board of irrigation of exclusive judicial powers is obnoxious to section 1 of article 6 of the constitution as invading the province of duly constituted courts. Without deciding, but assuming for purposes of this case, that said part of said act is unconstitutional, a cursory examination of the whole act shows it is impossible to declare that part valid without destroying the rest.

On petition for rehearing, this court at pages 325 to 328 of 61 Neb. expressly refused to decide the constitutional question because not then involved. On rehearing in that case, the purpose of the suit was more fully stated by Holcomb, J., in 67 Neb. 325. It seems, the plaintiff therein sought to have adjudicated appropriations of twelve persons from White river and to enjoin one Hall, a riparian owner, from interfering with the plaintiff's headgates to an irrigating canal he was constructing. The trial court refused to consider the merits because the state board had not first passed thereon. This court took a different view *in re* rights of riparian owners and hence reversed the judgment, remanding the case with direction to have it tried. In full discussion of the board's powers, we said at page 367: Powers of the same general nature are conferred upon almost every administrative body; these have frequently been decided to be of a *quasi* judicial nature, though such bodies are administrative. Such powers are not inhibited by the section of the constitution referred to. * * * For reasons given, we held the sections of the act in question not to be unconstitutional on points raised by counsel, and that the state board's authority to make the determinations and the need of its approval as a condition to the right of appropriation as provided in said act, is a valid exercise of legislative power. *Farm Investment Co. v. Carpenter*, 9 Wyo. 110, was cited to that point. In a concurring opinion, Judge Sedgwick said:

"Those parts of the irrigation act of 1895 which provide for a board of irrigation, and the adoption of a rule of ownership of water by appropriation, are constitutional."

In *McCook Irr. & W. P. Co. v. Crews*, 70 Neb. 115, the constitutionality of the irrigation act of 1895 was again challenged, but sustained.

Printed Record, pages 327 to 329.

We have examined further authorities. In the administration of the laws of the United States and of the several states, boards created to exercise executive or administrative functions are often compelled to inquire into and de-

termine questions requiring the exercise of powers judicial in their nature. Some of such determinations are often made by statute final and decisive, while others are made reviewable by appeal to the courts. The determination of the general land office in controversies over claims to public lands; of boards of medical examiners *in re* diplomas to medical practitioners; of county commissioners in this state *in re* forming drainage districts and highways; the judgment of a commission created by congress to pass on the validity of private land claims in territory ceded to the government, are examples. Whether reviewable by the courts or not, the exercise of such powers by such tribunals has seldom been held unconstitutional. The following authorities are here cited:

McGehee, Due Process of Law, 162, 368;
Reetz v. Michigan, 188 U. S. 505;
Gardner v. Bonestell, 180 U. S. 362;
Bates & Guild Co. v. Payne, 194 U. S. 106;
People ex rel. Deneen v. Simon, 176 Ill. 165;
Farm Investment Co. v. Carpenter, 9 Wyo. 110;
State v. Thorne, 112 Wis. 81 (55 L. R. A. 956);
Gee Wo v. State, 36 Neb. 841;
Lincoln Medical College v. Poynter, 60 Neb. 228.

We are satisfied with conclusion reached in cases cited as followed in Farmers Canal Co. v. Frank, 72 Neb. 136, and see no reason to change our conclusion in this respect.

Printed Record, page 329.

3.

On the point that the adjudication of priorities by the state board does not afford due process of law because the statute does not specifically provide for notice to the parties concerned, the court states what appears in paragraph 3 of syllabus *supra*. This is more especially the case where the proceedings are not in the nature of those at law or in equity.

The constitution and the statute will be construed together as one law. The court here cites following cases:

Baltimore & O. R. Co. v. Pittsburg, etc., Co., 17 W. Va. 812, 835;

Paulsen v. Portland, 149 U. S. 30;

Ky. R. R. Tax Cases, 115 U. S. 321, 324.

See also McGehee, Due Process of Law, 82, and cases cited in note to Sterritt v. Young, 4 L. R. A. n. s. 169 (14 Wyo. 146), beginning with page 173. Plaintiffs cite McGavock v. Omaha, 40 Neb. 64. Although the writer of the opinion there seems to think the authorities preponderate in favor of the view that notice must be prescribed in a statute in order that it be valid, the court expressly confines the holding to the proposition that if notice is not given in condemnation proceedings, the right to bring an action for damages is not barred. That case, therefore, is no authority in support of the proposition urged here.

Printed Record, pages 329 and 330.

4.

By the act of 1895, the duty of prescribing the method of procedure was committed to the state board; it formulated rules providing for notice and allowing for hearings, rehearings and appeals. [The court then states what appears in paragraph 4 of syllabus.]

5.

It is contended the secretary's opinion *in re* the Farmers canal was void, because in excess of the claim filed by its owner. Plaintiffs assume the "claim" adjudicated by the board was the affidavit filed. In this we think they are in serious error. The "claim" referred to by section 16 of the act is "The claim for appropriation now on record." It is concerning this claim and others based upon actual use without posting that "the method of determining the priority and amount of appropriations shall be determined by said state board." Moreover, in the 1889 report of the state board, the method of adjudicating claims is set forth,

showing that the copies of notices posted and filed, transmitted by the county clerks, and claims presented to the board by those who neglected to post notices, but who before 1895, had appropriated and used water, constituted according to its practice the "claims" to be adjudicated. We are of opinion that if no blank claim affidavit had ever been filed by the company, as in fact none was filed until long after the hearing had been had, the board would still have had jurisdiction to determine the validity and priority of claims "now on record." The rules of the board clearly show that the affidavit of a claimant filed under a recorded notice, was intended to be taken as evidence and not as a pleading. The opinion shows that "the claim * * * is made by virtue of posting three notices of appropriation at the proposed point of diversion," setting forth the time of posting and recording each notice. The authorities cited to sustain the proposition that a judgment in excess of the claim made is void, are therefore inapplicable as the finding was not in excess of the claim made.

Printed Record, page 330.

In this connection, plaintiffs' counsel say, if we assume the board had jurisdiction to hear and determine the claim of the Farmers Canal Company, as against other claimants to the use of water, then we are willing to concede that, if the board made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of then, it would be final if the company then claimed an appropriation to the extent of its allowance by the state board and other claimants had knowledge of such adjudication; but we do not concede that if a claimant only asks for an appropriation of 10 second-feet, the state board has jurisdiction to grant to him 1,000; or, if he applies for a permit to appropriate, or claims an inchoate or incomplete appropriation, that it has jurisdiction to allow a completed one.

By this concession it would seem that plaintiffs take the same view as did this court in the Frank case, since by the several notices which were matters of

public record, of which plaintiffs were charged with notice, said company claimed an amount of water greatly in excess of what was allowed to it by the state board. The fallacy in the argument of plaintiffs' counsel is, that the posted and recorded claims which the statute made the basis and moving cause of the board's action, were treated as of no force or effect, and the claim affidavit subsequently filed is assumed to be a pleading by which the board's authority is limited.

Printed Record, pages 330 and 331.

It is urged, that because section 19, act of 1895, provides:

“When the adjudication of a stream shall have been completed, it will be the duty of the state board to make and cause to be entered of record in its office an order determining and showing the several priorities,” etc.,

the action of the board on the claim of the Farmers Canal Company was void because the adjudication on the stream had not been completed when said opinion was filed and affirmed. It appears, however, hearings had been had upon all claims from the North Platte river, that the secretary proceeded to examine and render opinions upon each claim, that on January 7, 1897, opinions were rendered by him upon the claims of the Farmers Canal Company and others, and from time to time on other claims. On April 7, 1897, the opinions upon said claims from which appeals were not taken were affirmed by board resolution. A hearing was had on claims of several plaintiffs and a subsequent resolution adopted January 2, 1899, affirming their opinions rendered on rehearing. It seems that while the secretary filed his opinion on each claim, as soon as he had reached a conclusion about its validity and priority, the board itself took no action until the investigation was completed, when it affirmed the opinions *en masse*. The fact that rehearings were granted in a few cases could not operate to divest the board of the power possessed and already exercised. Even if the decision was premature, we are inclined to the view that it would be a mere irregularity and not a void act.

Printed Record, page 331.

Plaintiffs also argue that rule 3 of the board implies that the adjudication provided for was not intended to be final because it provides:

“The first adjudication of the rights of claimants shall be conducted for the purpose of determining the validity of claims,” etc.

This was what was done, i. e., the validity of the claims evidenced by the posted and recorded notices claiming water in specified quantities with priorities dating from the posting and recording thereof, were actually determined. When this was done, no further adjudication on this point could be had. The entire body of rules provides for no other hearing or adjudication except in cases of contest or rehearings before the secretary or the board.

Printed Record, pages 331 and 332.

6.

It is also contended, because no certificate was issued within 30 days after the determination of the board, there was nothing from which any of the parties could have appealed to the district court. The limitation of 30 days in which to issue the certificate, we think was merely directory. The certificate required by the statute does not constitute the adjudication, but is merely evidence thereof.

7.

It is next insisted the language of the opinions themselves shows they were not intended to be final adjudications, that the board and its secretary followed the practice which seems to have prevailed in the Colorado courts, by which in proceedings to settle water rights, decrees may be rendered both final and interlocutory in their nature; final and conclusive, as to water already applied to a beneficial use, conditional or interlocutory, in recognizing the capacity of the canal and the quantity required for future use, decreeing the same, contingent upon the exercise of diligence in constructing the ditch and applying the water. It is not improbable that the board had the Colorado practice in

mind. No statute in this state authorizes such conditional decree in a proceeding before the state board to ascertain and adjudicate priorities. Its duty under the statute was to ascertain the rights which had become vested before the act of 1895 and the extent of such rights. Their powers were special and limited and could not exceed the statutory grant. After the taking effect of that act, all water in the streams of the state, the right to appropriate which had not already vested, could only be set apart to individuals by obtaining a permit from the state board as provided in sections 28 to 31. In so far, therefore, as the board attempted to make a conditional order in said proceeding, its action was unauthorized and nugatory.

Printed Record, page 332.

But counsel insist, we erred in the Frank case in upholding the adjudication after eliminating its *ultra vires* condition. *Shaw v. Kellogg*, 170 U. S. 312, pertained to a Congressional grant in New Mexico to be selected from vacant and non-mineral land. The tract settled and selected by claimants was reported to the land department by the surveyor general of New Mexico whose duty it was to survey it and see that it was such as the grantees could rightfully select. The land department approved the survey, field notes and plat, noting its segregation on its maps, but the entry on the plat filed in the department under its directions by the surveyor general certified the approval to be "subject to the conditions and provisions of section 6 of the act of Congress approved June 21, 1860"—the act which provided the land should be non-mineral. The court held said limitation to be *ultra vires* and the title to be valid and unaffected thereby. It said it was the department's duty to decide, not to decline so to do; to execute, not to refuse to execute the will of Congress, which had authorized the selection and directed the surveyor general to survey and locate it. It was the duty of the department to see the grant carried into effect with full title to the proper land. It could disapprove the location if the land was mineral, but its duty was to decide that question—not

to evade such duty. It could not subject the locator to the chances of loss of title if mineral should thereafter be discovered. The mineral nature was to be decided then.

See also *Deffebach v. Hawke*, 115 U. S. 392, 404, where it is in effect said that the land officers are agents of the law, without authority to insert in the patent any terms except those of conveyance, with recitals showing compliance with the law and its prescribed conditions. By parity of reasoning, the state board here under sections 15 to 27 of the act had authority only to adjudicate the validity and priorities of the claims filed. This being done, its powers and duties ended. Since no application for unappropriated water was before it, it had no power to impose conditions.

Printed Record, pages 332 and 333.

In plaintiffs' briefs, much space is devoted to the proposition that controversies between rival appropriators are not within the scope of the powers and duties of the state board, because it is an administrative body. To grant the premises does not help plaintiffs here. The statute authorizes the board to fix a time to determine all claims to waters of the North Platte river which had become vested before April, 1895. Notice was given of the time and place of hearing; all parties to this suit or their grantors appeared; the board examined their claims, passed upon their validity and fixed their priorities. This was essential for its information to administer and distribute the unappropriated waters. Its rules provided for a contest of claims to be made, a hearing thereon, and for appeals from decisions of the secretary and board on such contests. No contests as to the rights of any claimant having been made, and no appeal being taken *in re* amount and priority of appropriations, the matter became settled so far as the board was concerned; in its future course in distributing water it was bound to follow its adjudications.

Printed Record, pages 333 and 334.

In *Ryan v. Tutty*, 13 Wyo. 122, in construing a statute of that state, which granted powers to water officials to regulate the use of water by different appropriators according to their priorities, and provided for an appeal from decisions of such officers to the state engineer and from him to the circuit court, the court, while holding a decision of the water officials not appealed from is not conclusive on the court, says:

“But it is to be observed that the statute clearly contemplates that such official action shall be *based upon a record of adjudicated priorities*. The officers are not vested with arbitrary control, but are required to divide the water according to the prior rights of the interested parties. * * * Primarily, the commissioner is authorized, whenever legally called upon, and it is his duty, to see that the water of the particular stream is diverted *in accordance with the established priorities*, and to prevent anyone from taking more water than he is entitled to take to the injury of others. He is not authorized to determine priorities. * * * The only object of his inquiry is that he may justly and fairly make a temporary distribution of the water *in conformity with the adjudicated priorities*.”

The italics in said excerpt are those of the Nebraska supreme court, but not in the Wyoming opinion. (N. B. Counsel signing this brief would italicize the words, “He is not authorized to determine priorities.”)

The question involved in the present suit is not decided in that case adversely to the views of this court, though cited by plaintiffs to their contention.

The court then cites *Boulder & Left Hand Ditch Co. v. Hoover*, 48 Colo. 343. The same principle was announced by this court in *Farmers & Merchants Irr. Co. v. Cozed Irr. Co.*, 65 Neb. 3.

Printed Record, page 334.

8.

In re the claim that the appropriation was lost by lack of diligence, by non-user or by abandonment, these facts must be considered. Before June 1, 1893, about \$96,000 had been expended on the canal, which for a distance of 19 miles from its headgate had capacity sufficient to irrigate 30,000 acres; 25 miles below said 19 miles had been opened up at various places to a full depth and nearly one-fourth of the construction work performed, though not connected up with the section wherein water was flowing.

The canal was kept in repair until 1898 by the Farmers Canal Company, and thereafter by land owners along its line with that company's consent, until it was taken possession of by the Tri-State Land Company. Until foreclosure of the trust deed, the company sought to sell additional bonds or to exchange them with contractors so as to extend and finish the canal. The foreclosure suit began in 1898, but the master's sale did not occur until December, 1901, its confirmation in February, 1902.

Frank filed his claim April 14, 1902; this was followed by the claim of intervention by the Farmers Irrigation District; the allowance of either would have destroyed the appropriation except for water sufficient to supply 5,000 acres. Walker, claiming prior appropriation, protested these claims; these matters by appeals to the district and supreme court continued until the final district court judgment, November 18, 1914. (The opinion then quotes that judgment, abstracted *ante* at pages 49 and 50.)

The Tri-State Company was organized in January, 1904. The next month it contracted with Walker to buy the property, the price depending on the result of that litigation. Relying upon that judgment, it paid the full stipulated price, receiving a conveyance recorded February 21, 1905; it then promptly began the enlargement and construction of the canal, expending over \$100,000 that year; it pursued this work in 1906 and thereafter with diligence until

its completion, so the canal can now furnish water for the entire 80,000 acres it was constructed to serve. The court then refers to the application in 1906 for leave to construct a needle dam. That said company had a valid existing right was then recognized by the state board by granting that leave. Said right has since been recognized by it in its administration of water.

Printed Record, page 335.

The purpose to carry on the enterprise and to construct the canal in its entirety was never abandoned by its owners; it has now been carried to completion. It is probably true that no actual construction work was done for about ten years, but from the time the foreclosure suit was begun until the final decision in the Frank case, the title to the property and right to the appropriation were in such hazardous and uncertain condition that few men would have invested money in its further development. The enterprise required large expenditure and years of effort.

Printed Record, pages 335 and 336.

While recognizing the rule that in final analysis the application of water to beneficial use within a reasonable time, conditions the appropriator's power to retain his right, and that an appropriator of water to be carried for use by others must diligently construct his works or lose his priority, we are convinced on all the facts here, it would be unjust now to enforce a forfeiture because of diligence, non-user or abandonment. We are aware it has been said, pecuniary difficulties do not excuse failure to carry on such work, but the cases announcing this doctrine turned on facts so dissimilar that we do not feel justified in adopting them as applicable here. This precise question may never arise again in this state, because by amendment made in 1911 to section 18, ch. 93a, Comp. St., a specified limited time is fixed to apply water and a procedure is established to determine the question of non-user or lack of diligence.

Printed Record, page 336.

9.

Upon the question whether, if the other contentions be decided in plaintiffs' favor, they are not estopped from equitable aid by their conduct, we must examine the facts admitted by the pleadings and evidence.

All parties taking part in the hearing knew, or were charged with knowledge, that notices had been posted by the Farmers Canal Company and duly recorded before the taking effect of the act of 1895. The act of 1889 by authorizing such filing and recording made the same a public record. These showed said company by the first notice claimed sufficient water to fill a canal of bottom width 40 feet, of water depth 4 feet, and by the others, additional water to amount to 200,000 miners' inches in a canal to be 80 feet wide and 8.84 feet deep at diverting point, with slope of banks one to one, with average grade not more than 2 feet per mile. Under section 32 of the act of 1895, 50 miners' inches equal one second-foot, so the water claimed much exceeded 1,142.86 second-feet as allowed. We find no specific denial of this knowledge either in pleadings or in evidence. After denying knowledge of the filing of the claim of said company with the board, of the hearing thereon or of the opinion and resolution, the petition alleges, "nor did the plaintiff herein or its grantor acquire any knowledge whatever of the above mentioned transactions of said board and its secretary for several years after they had taken place." This is not a negation of knowledge of the claims of the Farmers Canal Company, but only of the transactions of the board. It amounts to an admission that it acquired knowledge "several years after" 1896 and 1897, when the transactions mentioned took place. Said expression is vague and must be construed strongly against the pleader; it cannot be taken to mean about nine years from July, 1896, when the hearing was had, or January, 1897, when the resolution passed (*sic*). The defendants began the work of reconstruction and enlargement on a large scale in August, 1895. So there is no denial of want of knowledge even of the board's action before the latter time.

10.

The petition alleges that the defendants through their agents have at various times asserted and declared that they have a right of appropriation earlier than plaintiffs' to the extent of 1,142.86 second-feet. The time of such declaration is not disclosed; if recently made, the pleader would doubtless have so stated. The evidence also shows mailing to plaintiffs of notices and of printed rules of procedure, that at divers dates from June 24 to October, 1895, the grantor of plaintiff and ten other claimants, including the Farmers Canal Company, filed claims before the state board and that on July 17, 1896, another claim was filed by the owner of the Minatare canal. On the same day when the opinion *in re* Farmers canal was filed by the secretary, he also filed opinions in the respective claims for the Enterprise ditch and three others. It hence appears that all those who filed claims with or produced evidence before the board had notice of its transactions, at least to the extent of being aware that a hearing would be had; they were also charged with rules of practice adopted by the board. The evidence also shows that some rehearings, presumably on request, were had on some of the claims. The Frank application was filed in April, 1902, resulting in decision of this court June 9, 1904, upholding the right of the Farmers Canal Company to the prior appropriation it claims. This was followed by work done and expenditures incurred by the Tri-State Land Company. Of its total outlay in construction work of a trifle over \$1,650,000, \$950,000 were expended before the filing of original petition in this suit.

Printed Record, pages 337 and 338.

The question is, whether plaintiffs could stand idly by while defendants openly claiming this prior right expended nearly a million dollars, and then after the work was practically finished, enjoin the use of the water. Under section 10 of the act of 1895, the state board must render to the government biennial reports of its transactions and duties. The act touching the printing of other state reports pro-

vides for distributing 2,000 printed copies of said report, a public document of which we take judicial notice. The report for 1897 and 1898, contains a table of appropriations from the various streams of the state allowed since organization of the board in 1895. It shows that the Farmers Canal Company had been granted 1,142.87 second-feet, stating place of its headgate and priority date as September 16, 1887, with conditions mentioned; also the amounts of priorities awarded other litigants here. Said table appeared in each following report, so the information therein has been available to all litigants since early in 1900 hitherto.

From all these facts we must find, plaintiffs knew of the posted and recorded claims of the Farmers Canal Company, of the act of 1895, of its provisions requiring the state board to arrange to adjudicate priorities of all "claims for appropriation now on record," of the secretary's notice to appear before him, of the rules prescribed by the board about rehearing, appeals and contests, of its practice in deciding claims by written opinions, mailing copies thereof to each claimant, of the fact admitted in the reply that ever since the Tri-State Land Company became owner of the canal, "it claimed and still claims the right to 1,142.86 second-feet," of the vast undertaking of defendants to complete the canal with its extensive works, dams, headgates, etc., of its expenditure of a very large sum in a sparsely settled country.

Printed Record, page 338.

Moreover, the claims of all parties except two originated by posting notices and recording copies with the county clerk. When the state for its own purposes sought to determine vested rights to use of water, so it might apportion what remained as subject to appropriation, it gave all claimants equal opportunity to assert their claims. They all took advantage of said privilege, their rights were determined and they all acquiesced. Opportunity for contests of claims of others which might interfere was afforded to each under rules adopted and brought to their attention.

They filed no contests, took no appeals, but remained apparently content to recognize the board's authority. Relying on these conditions and the adjudication, defendants purchased the canal, worked on it for years and expended much money to complete it to irrigate the specific land which it was originally designated to reclaim. During all these years no claim of superior right seems to have been made, though it must be said when the supply was short and not used by defendant, it was used by some of the plaintiffs; but this is customary, right and proper when unused water is flowing in the stream. If a prior appropriator for carriage is not ready to use water, another's use is not adverse to give notice of a hostile claim.

Smith v. Duff, 39 Mont. 374;

Featherman v. Hennessy, 43 Mont. 310;

Ison v. Sturgill, 57 Ore. 109;

Weidensteiner v. Mally, 55 Wash. 79.

Under these circumstances and with this knowledge, it is plainly contrary to equity, if plaintiffs can stand silently by, see the defendants engage in such a monumental work under claim of right, and utter no word of warning as to their claims, which if finally established would deprive defendants of water which the canal was built to carry, condemn the whole enterprise to failure, and result in absolute loss of the money expended. Had plaintiffs insisted on their now asserted claims in good time, defendants at least would have been put on their guard; they would have had cause to pause and hesitate in their expenditures until the validity of their title had been determined.

Printed Record, page 339.

In Fremont Ferry & Bridge Co. v. Dodge County, 6 Neb. 18, the company sought to enjoin the county from building a bridge which would take away tolls from that built by plaintiff. The answer disclosed, a bridge had been made by the county which being partly delapidated, it was about to repair. The court said that plaintiff's silence, when knowing its own rights and regarding the steps taken

by defendant to build the bridge, will estop it after the work is completed or after large expense thereon had been made; "for such silence lulls to rest instead of warning danger, and * * * becomes a fraud."

Where a mill owner having riparian right to use water remained quiescent while an irrigation company expended large sums to construct its canal, this court in refusing to grant an injunction against the use awarded for irrigation said (here condensed): The proofs show the irrigating ditch was constructed at great expense in good faith in the belief on the part of its promoters that it could rightfully divert the water. Plaintiff was from the first fully advised of defendant's undertaking and purposes; he interposed no objection thereto until after the substantial completion of the work. The rule which denies equity relief to one who sleeps on his rights applies with full force to cases where the defendant is engaged in a work of public interest. No principle is more fairly established than that a suitor who by his laches has made it impossible to restrain the completion or use of public works without great injury to his adversary or the public, will be left to pursue his ordinary legal remedies.

Clark v. Cambridge & Arapahoe I. & I. Co., 45 Neb. 798.

New York City v. Pine, 185 U. S. 93.

Whether the original adjudication was or was not a mere administrative proceeding for the board's information, even if it should be held that the right to the full appropriation was lost by non-user before the Tri-State Land Company fully constructed its canal, plaintiffs were estopped to maintain this action.

Printed Record, pages 339 and 340.

In conclusion, the evidence shows when the state board made its determinations, irrigation in this state was in its infancy. The water flow in the North Platte at various seasons had not been definitely ascertained and was largely a matter of conjecture. Many of the determinations were for

water in excess of the amount which experience has shown was available for the several enterprises and which the works could convey. Perhaps this fact should be considered by the state board in times of scarcity, but this question was not presented and is not decided.

The true test of ultimate right to the water is its actual application to a beneficial use. The spirit and letter of the statute compels rigid economy in using water so its full benefit may be had. When prior appropriators do not use it, others may. No dog in the manger policy can apply. If the non-use is continued for the statutory time, the right ceases. It may be forfeited as the statute provides, and more diligent users may acquire the right to its use, under the authority of the board. A land owner who takes more than he is entitled to is liable in damages to those injured. No appropriator is entitled to more water than can be beneficially used or more than the least amount which good husbandry requires to produce crops.

We find it unnecessary to consider the rights of plaintiff and cross-petitioners against each other, since the result eliminates such questions.

The judgment of the district court is reversed and the cause dismissed, but without prejudice as to any controversy as between plaintiff and cross-petitioners.

Printed Record, pages 340 and 341.

Partial Dissenting Opinion by Hamer, J.

I concur in the opinion so far as it reverses the district court judgment, but no further. I am unwilling to adopt the views expressed in the opinion and dissent from them. I am unwilling that the case shall be dismissed and dissent from so much of the opinion as directs its dismissal. Only so much water should be adjudged to the main ditch as can be applied to a beneficial use. The amount applied should be with due regard to the rights of other appropriators.

Where the first appropriator fails to apply all the water within the limits of his appropriation to a beneficial use and there is an excess not so applied, the same shall be for the use of the next appropriator in his priority order; there should be no appropriation except for an actual beneficial use. The ditch should not be held entitled to appropriate water above what is intended for immediate use; water not so diverted and used should belong to the next appropriators in order of priority. As between ditches there should be a *pro rata* distribution based upon the amount each ditch has lawfully appropriated and applied to a beneficial use.

Printed Record, page 341.

The record shows that on November 25, 1912, there was filed in said Nebraska supreme court in said cause

MOTION FOR REHEARING.

The several appellees (plaintiffs in error here) jointly and severally move the court to vacate and set aside its findings and judgment herein and for rehearing for these reasons (here condensed):

1. The court erred in assuming it would be detrimental to the irrigation interests of Nebraska to have the alleged adjudications of the state board declared void.

2. It erred in defining what constitutes an appropriation.

3. Under the definition adopted by the court, the Farmers Canal Company had not, when the state board made its determination, acquired an appropriation for more water than enough to irrigate 5,661.5 acres, that being the greatest amount of land for which said company was ready and willing to furnish water."

4. The court erred in holding said board possessed jurisdictional power to adjudicate claims or rights acquired by rival appropriators before the passage of the irrigation law of 1895.

5. Because the rights of appropriation acquired prior to the passage of said act were vested property rights, and

determination of conflicts in such rights involved the exercise of purely judicial powers, which can only be conferred upon a court. Said state board, being administrative and possessed of only *quasi* judicial powers, had no power or authority to make an adjudication of such vested rights to have the force and effect of a decree in equity.

6. Because, under the construction placed by the court on section 16 of the irrigation act of 1895, said state board is authorized to prescribe rules of procedure and the kind and nature of notice to be given to the parties whose interests are to be affected by its action. This is a delegation of legislative power which would render such section of the statute unconstitutional and void.

7. If it be conceded that the transcript of posted and recorded notices transmitted by the several county clerks to said state board, constitutes the claims for adjudication, the court erred in assuming and holding that a claimant had no right by voluntary affidavit, pleading or evidence, to appear before said board and reduce the amount of his claim.

8. The statement in the opinion to effect that while the secretary of said board filed his opinion on each claim upon his reaching a conclusion thereon, the board took no action in the matter until the investigation was completed, when it affirmed the opinions *en masse*, is contrary to the stipulation of facts where it appears that on April 7, 1897, said board by resolution affirmed the opinion of the secretary on the claim of the Farmers Canal Company and others, on August 10, 1898, over a year later, said secretary filed an opinion on the claim concerning the Belmont ditch, on August 12, 1898, concerning the Alliance canal, on September 13, 1898, about the Chimney Rock canal, and that these latter opinions were affirmed by said board by another resolution on January 2, 1899. This part of the opinion, being based upon a misstatement of facts, should be corrected and the alleged adjudication of said state board declared void because prematurely entered.

9. The court erred in holding that the 30 days limitation within which to issue a certificate by said state board under section 21 of the act of 1895, is not mandatory. The purpose of said certificate is to notify the respective claimants of the adjudications actually made and to afford them an opportunity to appeal therefrom.

10. The court erred in holding that where a statute authorizes a proceeding affecting property rights without expressly providing for notice to be given to the property owners, the right to notice is implied; also in failing to hold that the provisions of ch. 69, laws 1895, providing for a determination of the rights of appropriation acquired before the passage of said act were unconstitutional and void, because said provisions purport to authorize an adjudication or determination of property rights without notice, and therefore constitute a taking of property without due process of law, contrary to the provisions of the 14th amendment of the United States constitution.

11. The court erred in holding that proper notice was given under the procedure authorized by section 16 of said act, to advise the various parties interested of the attempted determinations or adjudications which followed.

12. (This specification pertains to the Mitchell Irrigation District, whose cross-petition had been dismissed by the district court for want of jurisdiction and is of no concern here.)

13. The court erred in holding that the proceedings and determinations of said state board as construed by the court, constitute due process of law.

14. The court erred in declining to hold that any jurisdiction acquired by said state board by virtue of the notice mailed to the interested parties had been lost because of the failure of said board to continue said proceedings to some definite time for final determination.

15. When the alleged hearings were had before said board or its secretary, the part of the Farmers canal then

constructed would not carry water for more than 30,000 acres, and only 5,661.5 acres could be reached thereby. The appropriation of the canal of necessity must be limited to the acres susceptible of irrigation therefrom. In no event and by no construction can said canal be said to have an appropriation for more water than sufficient to irrigate 30,000 acres. The opinion of its secretary, afterward affirmed by said state board, provided: "The appropriation shall not * * * exceed the capacity of said ditch or canal." This proviso referred to a condition then existing, presumably within the knowledge of all parties affected thereby. In the opinion of this court it is said: "In so far, therefore, as the board attempted to make a conditional order in such proceeding, its action was unauthorized and nugatory." This language and the judgment based thereon annuls the condition in the alleged adjudication of said board, limiting the appropriation to the capacity of the canal. The opinion and judgment of this court arbitrarily annulling said limitation, modifies and changes the judgment or determination of said board, so as greatly to increase the allowance intended and actually made by said board to the Farmers Canal Company, and correspondingly decreases the appropriations acquired by the several appellees herein. This arbitrary modification of the determination of said board deprives each appellee of property without notice or due process of law and denies them the equal protection of the laws, contrary to the provisions of the 14th amendment of the United States constitution.

Printed Record, pages 344 and 345.

16. The court erred in assuming and holding that to declare invalid the "adjudication" of said state board *in re* the Farmers canal, in view of the statement of claim in its behalf and the evidence offered to support it (a part of the record before said board), will be to declare invalid all adjudications of said board in all cases, and hence be detrimental to the irrigation interests of Nebraska.

17. The court erred in holding as mere error and not fatally defective for want of jurisdiction, the "adjudica-

tion" of said state board *in re* the Farmers canal with the construction placed thereon in Farmers Canal Company v. Frank (72 Neb. 136), and in the opinion in this case, resulting in an award to the owners of said canal of more water than was justified by the statement of claim and evidence offered to said board, being its record.

18. The judgment of this court in said Farmers Canal Company v. Frank, in arbitrarily striking out plain, unequivocal and unambiguous conditions in the secretary's opinion *in re* claim of the Farmers Canal Company, whereby the appropriation allowed to said company was increased from 80 to more than 1,142 second-feet of water, deprived appellees herein of their property and the use of water without notice, without a right to be heard, and without due process of law, contrary to the provisions of the 14th amendment of the United States constitution.

19. The court in its opinion in this case failed to distinguish between abandonment and non-user. Abandonment depends upon intention, without reference to time of non-user. Non-user is independent of intention. Non-user alone for the prescriptive period causes former right to cease. The statute provides: "When the appropriator * * * ceases to use the water for such (a beneficial) purpose, the right ceases." In said Farmers Canal Company v. Frank, it was held that non-user for a period of ten years would cause the right of the appropriator to cease. Said statute, with the construction placed thereon, became a rule of property. The holding in this case abrogates the statute and said rule, amounts to judicial legislation, deprives appellees of the protection of the law previously extended them, and amounts to a taking of their property without due process of law, and denies them the equal protection of the laws, contrary to the provisions of the 14th amendment to the United States constitution.

Printed Record, page 345.

20. The doctrine of estoppel has no application here, since it is not based upon facts appearing in the record of this case, but upon a pure naked assumption of the court, feebly supported by alleged information gleaned from sources outside the record.

21. The arbitrary assertion of the court in this case that appellees are estopped to prevent appellants from taking and confiscating their property, deprives appellees of their property without due process of law and of the equal protection of the laws, contrary to the provisions of the 14th amendment to the United States constitution.

22. The holding of this court to effect that said "adjudication" of said state board *in re* the early appropriation effected by the Farmers canal, awarded to its owners and consumers 1,142 second-feet of water, being a construction of legislation of Nebraska enacted after the rights and appropriations of these appellees had become severally vested, deprives these several appellees of property without due process of law, contrary to the provisions of the 14th amendment to the United States constitution.

Said motion for rehearing was duly signed by counsel for appellees in said supreme court of Nebraska (plaintiffs in error here).

Printed Record, page 346.

On January 31, 1913, said Nebraska supreme court entered of record in this cause on its journal

ORDER DENYING MOTION FOR NEW TRIAL.

Said order states that on due consideration the court doth find no probable error in its judgment herein entered; therefore said motion is overruled and rehearing denied. The same is signed by the acting chief justice.

PETITION FOR WRIT OF ERROR,
ASSIGNMENT OF ERRORS AND PRAYER
FOR REVERSAL.

The same, duly entitled and filed in said case No. 17,552 in supreme Court of Nebraska (somewhat condensed), read:

Come now appellees (naming all plaintiffs in error in this court), and considering themselves aggrieved by the final decision of the supreme court of Nebraska in rendering judgment against them and each of them in said case, pray for a writ of error from said decision and judgment to the United States supreme court and an order fixing the amount of the bond.

They assign the following errors made by said supreme court of Nebraska in the judgment, record and proceeding of said cause:

1. In holding and deciding to be valid section 16 of ch. 69, session laws of Nebraska of 1895. The validity of said section was denied and drawn in question by said appellees in said court on the ground that it is repugnant to and in contravention of article 14, section 1, of amendments to the United States constitution, in that as construed by said court it provides for a conclusive adjudication and determination of appropriations of water from the streams of said state and their relative priorities, without prescribing or requiring any notice to interested parties. Thereby said appellees, as such interested parties, were and are deprived of property without due process of law, and were and are denied the equal protection of the laws.

Printed Record, page 348.

2. In holding and deciding that section 19 of same act was valid. The validity of said section was denied and drawn in question by said appellees in said court, on the ground that it was repugnant to and in contravention of article 14, section 1, of amendments to the United States constitution, in that, as construed by said court, it provides for a conclusive adjudication of the appropriations of water

from the streams of said state and their relative priorities, without prescribing or requiring any notice to interested parties, whereby said appellees, as said interested parties, were and are deprived of property without due process of law, and denied the equal protection of the laws.

3. In holding and deciding that those provisions of ch. 69 of session laws of Nebraska, 1895, which as construed by said court, provide for a conclusive adjudication and determination of the appropriation of water of the streams of said state and their relative priorities, were valid. The validity of said provisions was denied and drawn in question by said appellees in said court, on the ground that they are repugnant to and in contravention of article 14, section 1, of amendments to the United States constitution, in that neither said chapter or any other law of said state prescribed or required any notice to parties interested in property rights so to be determined, and particularly because section 19 of said chapter, as construed by said court, authorized and required the state board of irrigation conclusively to determine and establish the several priorities of right to the use of water of the North Platte river in said state, the amount of each appropriation, and the nature and kind of use for which each should be found to have been made, without prescribing or requiring any notice to interested parties therein, and without affording any opportunity to such parties, including said appellees, to be heard by or before said board. Thereby said appellees were and are deprived of property without due process of law, and are denied the equal protection of the laws.

4. In holding and deciding that the resolution and order of said state board made April 7, 1897, affirming the earlier opinion of its secretary, was a valid, binding and conclusive determination as against said appellees, that the Farmers Canal Company had a complete vested appropriation from said river to the extent of 1,142.86 second-feet of water of earlier date than the respective appropriations of appellees. The validity of said proceedings was denied and

drawn in question by said appellees in said court, on the ground that they were repugnant to and in contravention of article 14, section 1, of amendments to United States constitution, for the reason that no notice was served or information in any manner given to appellees, their respective grantors, predecessors in interest, or any party adversely interested concerning following matters:

(a) Of said company having made a claim for a perfected appropriation or priority in excess of 29 second-feet of water—the maximum amount then and for many years prior thereto diverted into said canal.

(b) Of said secretary's opinion.

(c) Of said order or resolution of said board.

(d) Of the amount of said earlier priority awarded to said Farmers Canal Company.

Printed Record, page 349.

By virtue of the premises, said appellees by the state of Nebraska were and are deprived of property without due process of law, and denied the equal protection of the laws.

5. In holding and deciding that the opinion of its secretary and the resolution of said state board, affirming said opinion, construed by said court as an adjudication, determination and award to the Farmers Canal Company of an appropriation of 1,142.86 second-feet of water, with priority senior to the respective appropriations of appellees, were valid and conclusive as against said appellees. The validity and effect of said opinion and resolution as so construed was denied and drawn in question by appellees, on the ground that they were repugnant to article 14, section 1, of amendments to the United States constitution and in contravention thereof, in that they deprived appellees of their property without due process of the law, and denied to them the equal protection of the laws, for reasons following:

(a) The provisions of ch. 69, session laws of Nebraska, 1895 (under which alone any authority of said secretary or board is claimed), to determine or adjudicate the property rights involved, do not provide for or require any notice to parties whose property rights and interests are to be affected.

(b) The rules of said state board in force when said secretary rendered said opinion and said board passed said resolution, did not provide for any notice of any opinion rendered, or to be rendered, by said secretary to any appropriator other than the appropriator whose claim was allowed by such opinion, nor did said rules provide for any notice to interested parties of the time or place where or when said board would determine the rights or relative priorities of appropriations of claimants of water from the same stream.

(c) The notice of date July 5, 1896, mailed to the parties herein or to their respective grantors, failed to advise said parties when or where their rights of appropriation or the relative priorities thereof would be determined, or that the same would ever be determined; it was therefore insufficient to authorize any adjudication or determination as against said appellees of the rights acquired by the Farmers Canal Company.

(d) No appellee or its grantor had any notice or information of the time when said secretary would render an opinion on the claim of said Farmers Canal Company, or that any such opinion had been rendered, or of the time or place when said board would determine the relative priority of said company, or of the fact that said determination had been affirmed by said board, until several years thereafter, when it was too late to take an appeal therefrom.

Printed Record, page 350.

6. The opinion and judgment of said supreme court of Nebraska in said case is repugnant to the 14th amendment of the constitution of the United States for reasons following:

(a) The opinion of the secretary of said state board relative to the appropriation of the Farmers Canal Company, under which appellants in said court deraign title, contains following limitations and conditions:

“The amount of the appropriation shall not exceed the capacity of said ditch or canal, nor the

least amount of water that experience may hereafter indicate as necessary for the production of crops in the exercise of good husbandry, and further, said appropriation under any circumstances shall be limited to one-seventieth of one cubic foot per second of time for each acre of land to which water has been actually and usefully applied on or before September 1, 1904."

(b) The stipulation of facts shows the amount of water applied before September 1, 1904, was less than 29 second-feet, and that the capacity of that part of the canal in question constructed on or prior to said last named date did not exceed 428 second-feet.

(c) Applying said limitation to facts admitted in this case, the water allowed to said canal by said secretary's opinion is limited to less than 29 second-feet. By the opinion and judgment of said court, said limitation was held void and said opinion construed as an absolute and unqualified allowance of an appropriation of 1,142.86 second-feet, with priority dating from September 16, 1887, and the appropriation allowed to said company by said board was thereby increased from 29 to 1,142.86 second-feet, which correspondingly decreased the amount and value of the appropriations of appellees, all of which were held to be junior to said appropriation of said Farmers Canal Company. Said appellees thereby were deprived of their property without notice or hearing or an opportunity to be heard, and hence without due process of law, and were denied the equal protection of the laws.

7. In holding and deciding that the limitations and provisions contained in the opinion of the secretary of said state board, affirmed by said board, whereby the quantity of water awarded to the Farmers Canal Company was limited to the capacity of its ditch and to one-seventieth of one second-foot for each acre of land to which water should be applied on or before September 1, 1904, should be excised therefrom as invalid and that what was then left of said affirmed opinion should be held as awarding an absolute grant of an appropriation of 1,142.86 second-feet to said

company, with a priority senior to the respective appropriations of appellees, contrary to the manifest intention of said secretary and said board in rendering and in affirming said opinion. Thereby appellees were and are deprived of their property in their respective junior appropriations without due process of law, and were and are denied the equal protection of the laws.

Printed Record, page 351.

8. The judgment and decision of said supreme court of Nebraska, to effect that said appellees were and are estopped to deny the claims of appellants in said court to an absolute completed appropriation of water amounting to 1,142.86 second-feet, of priority dating from September 16, 1887, deprives said appellees of their property and their respective appropriations of water from the North Platte river, without due process of law, and denies to them the equal protection of the laws, contrary to article 14, section 1, of amendments to United States constitution.

9. The judgment and decision of said supreme court of Nebraska, holding that if the claim of said appellants in said court to a completed appropriation of 1,142.86 second-feet of water, with priority dating from September 16, 1887, were in fact without merit and invalid as asserted by appellees, still the latter are estopped to controvert said claim because of failure to object to expenditures of money by said appellants in late construction work on their canal and irrigation works, deprives said appellees of their property and their respective appropriations without due process of law, and denies to them the equal protection of the laws, contrary to article 14, section 1, of the amendments to the United States constitution, for following reasons, viz.:

(a) The assumption of said court that appellees in fact acquiesced in the claims of said appellants and in their expenditure of money in reliance thereon, is not supported by any evidence whatever, but is contrary to the pleadings and the stipulation of facts.

(b) The improvements and expenditures made by said appellant, The Tri-State Land Company, were entirely con-

sistent with an intent to acquire an appropriation of water of priority date junior to the respective priorities of the appellees.

(c) Before appellant, The Tri-State Land Company, had commenced said expenditure of money, appellees had already expended their money and had been using the water under claims of priorities senior to that of appellant, all of which was known to said appellants, so that appellant, the Tri-State Land Company, was not and could not have been deceived or misled to its prejudice by the failure of appellees to institute litigation against it to prevent it from expending money to enlarge its canal.

10. If said supreme court of Nebraska did not err in holding and deciding that appellants in said court (defendants in error here) and their grantor once had an adjudicated completed appropriation of 1,142.86 second-feet of water earlier than the appropriations of said several appellees (plaintiffs in error here) from said stream, said court did err in holding that any proof of said senior appropriation in excess of 29 second-feet had not been lost by continuous non-user for more than ten consecutive years, pursuant to section 18, session laws of Nebraska, 1895, and the settled rule of construction of said statute, by virtue whereof said appellees severally had vested rights of property, to have their respective appropriations from said river recognized and enforced as junior and subordinate only to said 29 second-feet. The holding and decision of the supreme court of Nebraska to the contrary was challenged and drawn in question by said appellees in said court, on the ground that thereby they, and each of them, were deprived of their property without due process of law, and denied the equal protection of the laws, in contravention of article 14, section 1, of amendments of the United States constitution.

Printed Record, page 352.

For which errors said appellees (naming all of present plaintiffs in error in this court) and each of them pray that said judgment of the supreme court of Nebraska, of date

October 18, 1912, and the final judgment of said court in said cause rendered January 31, 1913, overruling the motion for rehearing, be reversed and judgment entered in favor of said appellees, and for costs.

Said assignments of error were signed by Thomas M. Morrow and Harry N. Haynes as attorneys for appellees in said court.

Printed Record, page 353.

PROVISIONS OF NEBRASKA CONSTITUTION.

Article 1, Section 3.

No person shall be deprived of life, liberty or property without due process of law.

Compiled Statutes of Nebraska (1909), page 38.

This section is discussed very fully, many authorities cited, and the court holds that an Act giving a city the right to establish a changed street grade

“must provide for notice, and such notice must be given as prescribed. * * * It is true that the authorities on this question of the necessity of notice are not uniform, but the weight of the authority quite heavily preponderates in favor of the view hereinbefore expressed * * *.”

McGavock v. Omaha, 40 Neb. 64, 79.

Article 1, Section 13.

All courts shall be open, and every person, after any injury done him and his lands, goods, * * * shall have a remedy by due course of law, * * * administered without denial or delay.

Compiled Statutes of Nebraska (1909), page 41.

Article 1, Section 21.

The property of no person shall be taken or damaged for public use without just compensation therefor.

Compiled Statutes of Nebraska (1909), page 42.

This section includes all actual damages which diminish the market value of property; it confers rights effective without legislation; it was intended to offer additional remedies to cover cases not embraced in the old constitution.

Omaha v. Cramer, 25 Neb. 493;
McGavock v. Omaha, 40 Neb. 64;
C. K. & N. R. R. Co. v. Hazels, 26 Neb. 364;
State v. Babcock, 19 Neb. 239;
O. & R. V. R. Co. v. Standen, 22 Neb. 351;

Said section applies to water rights.

McCook Irr. & W. P. Co. v. Crews, 70 Neb. 115.

Article 2, Section 1.

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.

Compiled Statutes of Nebraska (1909), page 44.

The Nebraska supreme court has held:

“The powers of the state government being thus, by the fundamental law, divided into these three distinct departments, it is clearly incompetent for the legislature to create a commission, and invest it with any official power, without assigning the duties thereof to one or the other of them. . . . Webster . . . says: “In government, ‘executive’ is distinguished from ‘legislative’ and ‘judicial’; ‘legislative’ being applied to the organ or organs of government which make the laws; ‘judicial’ to that which interprets and applies the laws; and ‘executive’ to that which carries them into effect.”

In re Railroad Commissioners, 15 Neb. 679, 682.

The division of powers between the several branches of the state government made by Article 2 of the constitu-

tion is comprehensive and final, and the legislature can neither add to nor subtract from the classes or character of questions with which the courts are entitled to deal.

Tyson v. Washington County, 78 Neb. 211.

Article 3, Section 1.

The legislative authority is vested in a senate and house of representatives.

Compiled Statutes of Nebraska (1909), page 45.

Section 7 of article 3 makes each house, judge of the election, etc., of its own members.

Compiled Statutes of Nebraska (1909), page 46.

Section 14 of article 3 provides that the senate and house of representatives in joint convention have sole power of impeachment; also that impeachment trials shall be by the supreme court, save on impeachment of one of its justices, in which event all the district judges of the state try the case.

Compiled Statutes of Nebraska (1909), page 50.

These sections 7 and 14 provide the only exceptions to the investing of judicial power exclusively in the courts.

Article 5, Section 1.

The executive department shall consist of a governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general and commissioner of public lands and buildings * * *.

Compiled Statutes of Nebraska (1909), page 57.

Article 5, Section 6.

The supreme executive power shall be vested in the governor, who shall take care that the laws be faithfully executed.

Compiled Statutes of Nebraska (1909), page 58.

Article 5, Section 26.

No other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created.

Compiled Statutes of Nebraska (1909), page 62.

Held, under this section an attempted legislative creation of so-called state officers or boards not consisting of those officers of the executive department named in article 5, section 1, or some of them or by their deputies subject to removal at pleasure, is wholly unconstitutional and void.

In re Railroad Commissioners, 15 Neb. 683;

State v. Porter, 69 Neb. 203;

Tyson v. Washington County, 78 Neb. 211.

Article 6, Section 1.

The judicial power of this state shall be vested in a supreme court, district courts, county courts, justices of the peace, police magistrates, and such other courts inferior to the district courts as may be created by law for cities and incorporated towns.

Compiled Statutes of Nebraska (1909), page 62.

Article 6, Section 9.

The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the legislature may provide * * *.

Compiled Statutes of Nebraska (1909), page 64.

Article 6, Section 19.

All laws relating to courts shall be general and of uniform operation, and the organization, jurisdiction, powers, proceedings, and practice of all courts of the same class or grade, so far as regulated by law and the force and effect of the proceedings, judgments and decrees of said courts, severally, shall be uniform.

Compiled Statutes of Nebraska (1909), pages 66 and 67.

Article 6, Section 24.

All process shall run in the name of the "State of Nebraska." * * *

Compiled Statutes of Nebraska (1909), page 68.

The only exceptions in the Nebraska constitution providing for the exercise of judicial powers except by the courts are those named in sections 7 and 14 of article 3, as above mentioned. Said constitution nowhere mentions irrigation, diversion or appropriation of water from the public streams in the state, or state control thereof. In this it varies from the constitution of Wyoming.

NEBRASKA STATUTES CONCERNING
IRRIGATION.

The first act referring to irrigation canals was passed in 1877, viz.:

An act to enable corporations formed for the construction and operation of canals for irrigation and other purposes, to acquire right of way and to declare such canals works of internal improvements.

Sec. 1. Any corporation organized under the laws of this state for the purpose of constructing and operating canals for irrigation or water power purposes, or both, may acquire right of way over or upon any lands for the necessary construction of said canal, including dams, reservoirs, and all necessary adjuncts to said canal, in the same manner as railroad corporations may now acquire right of way for the construction of railroads, and the provisions of law applicable to acquiring right of way by railroad corporations are hereby declared to be applicable to corporations for the construction of canals for irrigation or water power purposes, or both.

SEC. 2. Canals constructed for irrigating or water power purposes, or both, are hereby declared to be works of internal improvements; and all laws applicable to works of internal improvements are hereby declared to be applicable to such canals.

Session Laws of Nebraska, of 1877, page 168.
Nebraska Comp. Sts. 1887, Secs. 158 and 159.

This section is referred to in *Crawford v. Hall*, 67 Neb. 325, 363, where the court said:

“It contemplated the appropriation of the waters of the streams and their use for irrigation * * * in conformity with the custom and usages prevailing in arid portions of the western country, where irrigation is essential to agriculture.”

NEBRASKA IRRIGATION ACT OF 1889.

This act was the one under which the rights of nearly every litigant herein became vested to extent of application of water to beneficial use. Those of its sections having any application to this suit are copied in full; brief references are made to intervening sections, to show the subject covered.

Article 1.—Water Rights.

SEC. 1. The right of the use of running water, flowing in a river or stream or down a canon, or ravine, may be acquired by appropriation by any person or persons, company or corporation organized under the laws of the state of Nebraska; provided, that in all streams not more than fifty feet in width, the rights of riparian proprietors are not affected by the provision of this act.

SEC. 2. The appropriation must be for some useful or beneficial purpose, and when the appropriator or his successor in interest ceases to use it for such a purpose, the right ceases.

Sections 3 to 6, inclusive, limit the number of ditches to cross a tract of land against its owner's consent (sec. 3); exemption from taxation of irrigating ditches or laterals (sec. 4); permission to a ditch owner to change its place of

diversion without injury to others and right of extension of a ditch to new lands (sec. 5); forbid discharge of water from a ditch into a different channel than that from which it is diverted (sec. 6).

SEC. 7. As between the appropriators the one first in time is first in right.

SEC. 8. A person, company or corporation desiring to appropriate water must post a notice in writing in a conspicuous place at the point of the intended diversion, stating therein:

1st. That he, they or it claims the water there flowing to the extent of (giving the number) inches, measured under a four inch pressure, and accurately describing the point of diversion.

2nd. The purpose for which he, they or it claim it, and the place of intended use.

3rd. The means by which he, they or it intend to divert it, and the size of the flume, ditch, pipe or aqueduct in which it is intended to divert it. A copy of the notice must, within ten days after it is posted, be recorded in the office of the county clerk of the county in which it is posted.

SEC. 9. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which it is intended to divert the water, and must prosecute the work diligently and uninterruptedly to completion unless temporarily interrupted by snow or rain.

SEC. 10. By completion is meant conducting the water to the place of intended use.

SEC. 11. By compliance with the above rules, the claimant's right to the use of water relates back to the time the notice was posted.

SEC. 12. A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies herewith, except as provided in the next section.

SEC. 13. All ditches, canals and other works heretofore made, constructed or provided by means of which the waters of any stream have been diverted and applied to any beneficial use must be taken to have secured the rights to the waters claimed to the extent of the quantity which said works are capable of conducting and not exceeding the quantity claimed, without regard to or compliance with the requirements of this chapter.

SEC. 14. Persons who have heretofore claimed the right to water and who have not constructed works in which to divert it, and who have not diverted it nor applied it to some useful purpose must, after this title takes effect, and within ninety days thereafter, proceed as in this title provided, or their right ceases.

SEC. 15. The county clerk of each county must keep a book, in which he must record the notices provided for in this title.

Article 2.—Right of Way for Ditches.

SEC. 1. All persons, companies and corporations owning or claiming any lands situated on the banks or in the vicinity of any stream, are entitled to the use of the waters of such stream for the purpose of irrigating the land so held or claimed.

Sections 2 to 7 of said article provide a judicial method to condemn rights of way for such ditches by petition to a county judge, notice thereon, appointment of appraisers, details of procedure and award, with appeals first to district and later to supreme court, conditions of such appeals, etc. Sections 8 and 9 are substantially the same as the two sections of the act of 1877 *ante*, with right to follow the same simplified procedure in eminent domain. Section 10 pertains to the careful maintenance of ditches or other like works. Part of section 11 and all of 12, as possibly pertinent here, are copied, viz.:

SEC. 11. Nothing in this chapter contained must be so construed as to interfere with or impair the rights of water appropriated and acquired prior to the passage of this chapter. * * *

SEC. 12. In case the volume of water in any stream is not sufficient to supply continually the wants for irrigating purposes of the owners or proprietors of land in any district or neighborhood in which customs exist for distributing the waters amongst such owners or proprietors, the waters diverted must in such case be held to be a common right in those accustomed to the participation in the use and enjoyment of such distribution, and such customs must be upheld in all courts as conferring such common right in the same. But this section does not affect any prior vested rights.

Section 13 is quite long. It has little if any application to this suit. In condensed form it provides: If any person or company has constructed a ditch to divert water from a natural source to sell the use thereof for irrigating purposes, the land holders along its line have the right to use water from said conduit to irrigate in this order: (1st) lands traversed by the ditch in their order; (2nd) next, as to tracts on either side, those equi-distant from its line in their order. In times of scarcity of water, it shall be prorated among those consumers who pay the customary rate. The ditch line cannot be so changed as to interfere with prior users of water therefrom. The owner must keep the ditch in good repair and cause water to flow through it as required by users for irrigating, if the natural source is adequate. Failure to perform this duty shall be actionable.

SEC. 14. No person entitled to the use of water from any such ditch or canal, must under any circumstances use more water than good husbandry requires for the crop or crops that he cultivates, and any person using an excess of water is liable to the owner of such ditch or canal for the value of such excess, and in addition thereto, is liable for all such damages sustained by any other person, who would have been entitled to the use of such excess of water as fixed by this section.

Section 15 creates certain misdemeanors incident to interfering with a ditch or the use of water therefrom, and like matters. Section 16 repeals the act of 1877 copied *ante*. Section 17 makes the Act in force after its passage.

Said act of 1889, as well as that of 1877, is referred to in *Fenton v. Tri-State Land Company*, 89 Neb. 479.

IRRIGATION ACT OF 1895.

This act constitutes ch. 69 of Nebraska laws of 1895. It was approved April 4, 1895, with emergency clause. Those parts thereof to be considered will be copied verbatim; the topics of other sections concisely shown.

Section 1 divides the state into two water divisions numbered 1 and 2.

SEC. 2. Water division No. 1 shall consist of all the irrigable lands of the state drained by the Platte rivers and their tributaries lying west of the mouth of the Loup river; and also all other lands lying south of the Platte and South Platte rivers that may be watered from other superficial or subterranean streams not tributary to said Platte river.

SEC. 3. Water division No. 2 shall consist of all irrigable lands that may be watered from the Loup, White, Niobrara and Elkhorn rivers and their tributaries, and all other irrigable lands of the state not included in any other water divisions.

SEC. 4. There is hereby created a state board of irrigation composed of the governor, attorney general and the commissioner of public land and buildings.

SEC. 5. The board shall have an office at the state capitol, to be provided by the state board of public lands and buildings, which shall be furnished by the secretary of state with suitable furniture, postage and other necessary books and instruments as will best enable said board and its assistants to properly discharge the duties which may devolve upon said board.

SEC. 6. The governor shall act as president of the state board of irrigation.

SEC. 7. At its first meeting the state board of irrigation shall elect a secretary, who shall be an hydraulic engineer of theoretical knowledge and practical skill and experience. He shall hold his office for a term of two years and until his successor is elected and qualified [providing for his salary, paid by the state].

Section 8 empowers the secretary, with the board's consent, to employ a practical engineer as his assistant; also other assistants. Compensation of such assistants by the state is provided. Section 9 is devoted solely to expenses of the secretary or his assistants.

SEC. 10. The state board through its secretary shall prepare and render to the governor, bi-annually, and oftener if required, full and true reports of the work of the state board touching all of the matters and duties devolving upon said board by virtue of its offices, which report shall be delivered to the governor on or before the 30th day of November of the year preceding the regular session of the legislature.

Under Secretaries.

SEC. 11. There shall be one under secretary for each water division by this act created, who shall be elected by the state board of irrigation at its first meeting, and shall hold his office for two years, or until his successor is elected and he shall have entered upon the duties of his office, and who shall reside in the water division of which he is elected. The under secretary of each water division, acting for the state board, shall have immediate direction and control of acts of the under assistants and of the distribution of water in his water division.

SEC. 12. Said under secretary shall, under the direction of the state board, see that the laws relative to the distribution of water are executed in accordance with the rights of priority of appropriation.

Section 13 requires all under secretaries to report to the state board of irrigation; it also provides for their compensation and expenses.

Section 14 fixes the compensation of said under secretary.

SEC. 15. The state board of irrigation shall hold two regular meetings each year for the transaction of such business as may come before it. The first meeting of the board shall begin on the third Wednesday following the date on which this act shall take effect; thereafter the said meetings shall begin on the first Wednesday in September and the first Wednesday in April. A majority of all the members of said board shall constitute a quorum to transact business. It shall be the duty of the secretary of said board to keep a full, true and complete record of the transactions of said board, and shall certify all certificates of appropriation of water made in accordance with the provisions of this act.

SEC. 16. It shall be the duty of the state board at its first meeting to make proper arrangements for beginning the determination of the priorities of right to use the public waters of the state, which determination shall begin on streams most used for irrigation, and be continued as rapidly as practicable until all the claims for appropriation now on record shall have been adjudicated. The method of determining the priority and amount of appropriation shall be determined by the said state board, which at its first meeting shall designate the streams to be first adjudicated.

SEC. 17. It shall be the duty of the secretary of the state board of irrigation as soon as practicable after the passage of this act to measure, or cause to be measured, the quantity of water flowing in the several streams of the state and to make a record thereof in the office of said board, and he shall from time to time make such additional measurements

as may be necessary, or cause the same to be made, for the information of such board in considering applications for water appropriations and such controversies as may arise regarding the distribution of water.

- SEC. 18. All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose, the right ceases.
- SEC. 19. When the adjudication of a stream shall have been completed it will be the duty of the state board to make and cause to be entered of record in its office an order determining and establishing the several priorities of right to use the water of said stream, and the amount of the appropriation of the several persons claiming water from such stream and the character and kind of use for which such appropriation shall be found to have been made.
- SEC. 20. Each appropriation shall be determined in its priority amount, by the time at which it shall have been made, and the amount of water which the works are constructed to carry; provided, that such appropriator shall at no time be entitled to the use of more than he can beneficially use for the purposes for which the appropriation may have been made, and the amount of any appropriation made by means of the enlargement of the distributing works heretofore shall be determined in like manner; provided, that no allotment for irrigation shall exceed one cubic foot per second for each 70 acres of land for which said appropriation shall be made.
- SEC. 21. Within thirty days after the determination of the priorities of appropriation to the use of water of any stream, it shall be the duty of the state board, through its secretary, to issue to each person, association or corporation, a certificate to be signed by the president of the state board, and attested by the secretary of said board, setting forth

the name and postoffice address of the appropriator, the priority number of each appropriation, the amount of water appropriated and the amount of prior appropriation, and if such appropriation be for irrigation, a description of the land to which it is to be applied and the amount thereof. Said certificate shall be transmitted by the said state board of irrigation through its secretary, by registered mail, to the county clerk of the county in which said appropriation shall have been made, and it shall be the duty of said county clerk, within ten days after the receipt of said certificate to record the same in a book especially prepared and kept for that purpose, and to notify the party, or parties, in whose favor the said certificate is issued of such record, and transmit said certificate to said party, or parties, on payment of the fees for recording, which fee shall not exceed seventy-five cents for each certificate so recorded.

SEC. 22. Any party or number of parties acting jointly, who may feel themselves aggrieved by the determinations of the state board, may have an appeal to the district court of the county within which the appropriation or appropriations of the party or parties so aggrieved may be situated. All persons joining in the appeal shall be joined as appellants, and all persons having interests adverse to the parties appealing or either of them, shall be joined as appellees.

SEC. 23. The party or parties appealing shall, within sixty days of the determination of the state board which is appealed from and the entry thereof on the records of the board, file in the office of the clerk of the district court to which the appeal is taken a notice in writing, stating that such party or parties appeal to the district court from the determination and order of the state board, and upon the filing of such notice, the appeal shall be deemed to have been taken; provided, however, that the party or parties appealing shall, within the sixty days men-

tioned, enter into an undertaking, to be approved by the district court or the clerk thereof, and to be given to all parties in said suit or proceedings, other than the parties appealing, conditioned that the parties giving the said undertaking shall prosecute their appeal to effect and without unnecessary delay, and will pay all costs and damages which the party to whom the undertaking is given, or either or any of them, may sustain in consequence of such appeal; provided, such case is decided against the appellant.

SEC. 24. The order mentioned in the preceding section shall be entered of record in the records of the state board and the appellant or appellants shall cause a certified copy thereof to be served with the summons hereinafter provided on each of the appellees in the manner provided for serving summons from the district court.

SEC. 25. The appellant or appellants shall, within sixty days after giving the undertaking hereinafter mentioned, file in the office of the clerk of such district court a certified transcript of the order of determination made by the state board and which is appealed from; and the measurement of streams, tributaries or ditches that may have been made, together with a petition setting out the cause of the complaint of the party or parties appealing to which all parties named as appellants shall be made parties; summons in such appeal to be issued by the clerk of such district court and served in the manner provided by law for the service of summons in action of law; and all proceedings on appeal shall be conducted according to the proceedings of the code of civil procedure. All costs made and accruing, by reason of such appeal shall be adjudged to be paid by the party or parties against whom such appeal shall be finally determined.

SEC. 26. Within thirty days from the passage of this act it shall be the duty of the county clerk of each of the counties of this state to prepare a full and complete transcript of all the claims to appropriations of water now on file in their respective offices, and to transmit the same without delay to the secretary of the state board by express or registered mail, for which service he shall be paid by the county the sum of five cents per folio to prepare said transcript; provided, that the county clerk may, in place of such abstract, transmit the original record of claims to water that are recorded in books kept especially for the purpose, in which case he shall receive no compensation.

SEC. 27. Immediately upon receipt of said transcripts or the original records, it shall be the duty of the state board to file them in its office, and to classify and arrange said claims by placing all the claims to the waters of one stream and its tributaries together.

SEC. 28. Every person, association or corporation hereafter intending to appropriate any of the public waters of the state of Nebraska shall, before commencing the construction, enlargement or extension of any distributing works, or performing any work in connection with said appropriation, make an application to the state board for a permit to make such appropriation. Said application shall set forth the name and postoffice address of the applicant, the source from which said appropriation shall be made, the amount thereof as near as may be, location of any proposed work in connection therewith, the time required for their completion, said time to embrace the period required for the construction of the ditches thereon and the time at which the application of the water for beneficial purposes shall be made; which said time shall be limited to that required for the completion of the work when prosecuted with diligence, the purpose for which water is to be supplied, and if for irri-

gation, a description of the land to be irrigated thereby, and the amount thereof, and any additional facts which may be required by the state board. On receipt of this application, which shall be of a form prescribed by the state board and to be furnished by the secretary without cost to the applicant, it shall be the duty of the state board through its secretary to make a record of the receipt of said application and cause the same to be recorded in its office, and to make a careful examination of the application to ascertain whether it sets forth all the facts necessary to enable the state board to determine the nature and amount of the proposed appropriation. If such an examination shows the application in any way defective it shall be the duty of the state board to return the same to the applicant for correction. If there is unappropriated water in the source of supply named in the application, and if such appropriation is not otherwise detrimental to the public welfare, the state board, through its secretary, shall approve the same by endorsement thereon and shall make a record of such endorsements in some proper manner in his office and return the same so endorsed to the applicant, who shall, on receipt thereof, be authorized to proceed with the work and to take such measures as may be necessary to perfect such appropriation; provided, however, that the state board, through its secretary, may, upon examination of such application, endorse it approved for a less amount of water than the amount of water stated in the application, or for a less amount of land or for a less period of time for perfecting the proposed appropriation than that named in the application; and provided further, that an applicant feeling himself aggrieved by the endorsement upon his application, may take an appeal therefrom to the district court of the county in which may be situated the point of diversion of the proposed appropriation. Such appeal shall be per-

fectured when the applicant shall have filed in the office of the clerk of the district court a copy of the order appealed from, certified by the secretary of the state board as a true copy, together with the petition to such court, setting forth appellant's reason for such appeal. Such appeal shall be heard and determined upon such competent proofs as shall be produced by the applicant and such like proofs as shall be produced by the state board to any person duly authorized in its behalf. If there is no unappropriated water in the source of supply, or if a prior appropriation has been made to water the same land to be watered by the applicant, the state board, through its secretary, shall refuse such appropriation and the party making such application shall not prosecute such work so long as such refusal shall continue in force.

SEC. 29. Upon the approval and allowance of an application the applicant shall send to the state board's office within six months thereafter a map or plat, upon a scale of not less than two inches to the mile, showing the location and the course of the distributing works, the source from which the appropriation is taken, and the legal subdivisions of the land upon which the water appropriated is to be applied, which said map shall be filed and preserved in said office as part of the records.

SEC. 30. Upon its being made to appear to the satisfaction of the state board that the application in this act provided for, has been perfected in accordance with law, and the endorsement thereon by the secretary of the state board, it shall be the duty of said board by the hand of its president, attested by the secretary, to send to the county clerk a certificate of the same character as that described in section 21 of this act, which said certificate shall be recorded in the office of the county clerk, and provided for in section 21 of this act.

SEC. 31. The priority of such appropriation shall date from the filing of the application in the office of the state board.

SEC. 32. A cubic foot of water per second of time shall be the legal standard of the measurement of water in this state, both for the purpose of determining the flow of water in the natural streams and for the purpose of distributing therefrom; provided, water heretofore sold by the miner's inch shall continue to be delivered in that way; all water sold by the miner's inch shall be measured as follows: Fifty miner's inches under a four inch pressure shall be deemed equivalent to a cubic foot per second of time.

Section 33 on due petition, authorizes the board to create water districts in each water division in its discretion, if needed to protect water claimants and to economize supervision.

Section 34 provides for appointment by the board of an under assistant for a water district when one is created.

Section 35 makes it the duty of such district under assistant, subject to the board's direction, to divide the water in the natural streams in his district among the several ditches according to their respective priorities, with full control of headgates, subject to direction of the assistant secretary of his water division. Certain misdemeanors are created, aimed at those who shall interfere with such official functions, etc.

Section 36 provides for the compensation of said under assistants.

Section 37 requires each ditch owner to maintain substantial headgates; also, within 90 days after notification, to file with said state board a suitable plat of his ditch as provided in section 29, and such other information as the board may call for.

SEC. 38. Any person, corporation or association hereafter intending to construct any dam for reservoir purposes or across the channel of

any running stream above ten feet in height, shall, before beginning such construction, submit the plan of the same to the state board of irrigation for their examination and approval, and no dam above ten feet in height shall be constructed until the same shall have been approved by such board.

Sections 39, 40 and 41 confer eminent domain power on ditch owners, also grant them rights of way through state lands or through any highway without compensation.

SEC. 42. The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as heretofore provided.

SEC. 43. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes.

Section 44 provides that all ditches to utilize waste, seepage, swamp or spring waters of the state shall be governed by the same laws *in re* priority of right, as those diverting from running streams, subject to a certain proviso.

Section 45 permits any person to discharge water into a natural stream and withdraw its equivalent. It further gives right of condemnation for that purpose where some riparian land owner claims to be injured thereby.

Section 46 provides that the owner of any ditch constructed to convey or sell water for irrigation shall not

change its line to interfere with the previous use of water therefrom; he shall keep it in good repair, to cause water to flow through it between April 15 and November 1 each year, if demanded by users and the source of supply is sufficient. Neglect of said duty makes him liable for damages.

Sections 47 and 48 are substantially the same as the act of 1877 referred to *ante*.

SEC. 49. Nothing in this act contained shall be so construed as to interfere with or impair the rights to water appropriated and acquired prior to the passage of this act.

Sections 50 to 61, inclusive, have no bearing on issues in this case. They pertain to the following subjects:

Section 50 penalizes wrongful interference with ditches, stealing water, etc.

Section 51, careful building and maintenance of ditches, with convenient bridges, crossings, etc.

Section 52, ditch owner's duty in maintenance of suitable outlets.

Section 53, ditch to have superintendent to measure water out to consumers, to control lateral gates and like matters.

Section 54, duty of water consumer to take no more water than he should.

Section 55, liability of consumer for permitting too much water to come to his land.

Section 56, right to construct irrigation reservoirs and appropriate water therefor, including condemnation. Also liability of reservoir owners for leakage, overflow or breakage.

Section 57, penalizing superintendent or one in charge of canal neglecting to perform duties.

Section 58, duty of ditch owner *in re* bridges over public highways and method of enforcing that duty.

Section 59, duty of ditch owner to maintain its banks to prevent waste and to return unused water with minimum of waste to stream from which it was diverted.

Section 60, duty of ditch owner to prevent overflow on to highway, penalizing neglect thereof.

Section 61, exempting all irrigation ditches and works from taxation.

SEC. 62. Within six months after the approval of any application for water under this act by the state board of irrigation the person or persons, corporation or association making such application shall commence the excavation or construction of the works in which it is intended to divert the water, and shall vigorously, diligently and uninterruptedly prosecute such work to completion, unless temporarily interrupted by some unavoidable and natural cause, and a failure to comply with this section shall work forfeiture of the appropriation and all rights thereunder.

Section 63 provides that a deed or contract of a ditch owner, conveying the right to use water to irrigate any tract of land shall be recorded; from recording it shall bind the grantor, his successors, assigns and all those claiming interest in the ditch; no foreclosure or like proceedings to enforce sale of the ditch for debt shall impair the right of such grantee or his assigns, etc., to use water as provided in his contract.

SEC. 64. Upon any appeal being taken as is by this act provided, from the board of irrigation to the district court of this state, it shall be the duty of said court to advance such appeal to the head of the trial docket and to give such appeal precedence over other civil cases, in hearing and determination thereof, and if an appeal be taken in such action from the judgment or decree of the district court to the supreme court of the state, it shall in like manner be the duty of the supreme court to advance such appeal to the head of its docket for the trial of civil cases, and give such causes like precedence as to trial.

SEC. 65. Water for the purpose of irrigation in the state of Nebraska is hereby declared to be a natural want.

Section 66 defines a mutual irrigation company and provides for certain details thereof.

Section 67 authorizes an irrigation company to assess its shareholders for maintenance, and provides for enforcement of such assessments.

Section 68 repeals sections 1, 2, 3, 4 and 8 to 15 of article 1 of the irrigation act of 1889.

Section 69 makes the act effective on its passage and approval, which was April 4, 1895.

NEBRASKA STATUTE RELATING TO LIMITATIONS
OF REAL ACTIONS.

Section 6, title 2, code of civil procedure, reads:

“An action for the recovery of the title or possession of lands, tenements or hereditaments, can only be brought within ten years after the cause of such action shall have accrued.” * * *

Compiled Statutes of Nebraska (1909), page 1970.

This has been the law of Nebraska since 1869, when the time of limitation was reduced from twenty-one to ten years.

SECTION 34, NEBRASKA IRRIGATION ACT OF 1911.

Sec. 34. Forfeiture of rights.—All appropriations for water must be for some beneficial or useful purpose, and when the appropriator or his successor in interest ceases to use it for such purpose the right ceases. It shall be the duty of the board as often as necessary to examine into the condition of every water appropriation within this state, either by its secretary, assistant secretary or superintendents, and into the condition of all ditches and canals constructed or partially constructed within the State of Nebraska, and such secretary, assistant secretary or superintendent shall make a report in writing to the board of the condition of every water appropriation, and all ditches and canals and other works constructed, or partially constructed thereunder, and if it shall appear from such report that any water appropriation in the State of Nebraska *has not been used for some beneficial or useful purpose, or having been so used at one time, has ceased to be used for*

*such purpose for more than three years, then in that case the state board, through its secretary, shall appoint a place and time of hearing and shall serve notice upon the person, association or corporation, owning such water appropriation or owning such ditch or canal, or other diverting works to show cause by such time and at such place, why the water appropriation owned by such person, association or corporation should not be declared forfeited and annulled, and shall also serve such notice upon the land owners under such water appropriation, ditch or canal. Such notice shall contain the date and place of hearing, a description of the water appropriation, the number thereof upon the books and records of the state board, the date of priority and the point of diversion and a description of the lands which are located under such water appropriation, and shall call upon all persons interested in said water appropriation to show cause why such water appropriation should not be canceled or annulled. Such notice shall be served personally at least thirty days before said date of hearing upon the person, association or corporation owning or controlling the water appropriation and the ditch, canal or reservoir for the purpose of using or storing water for any purpose whatsoever, if such person, association or corporation is known to the state board to be the owner thereof and maintains an office within the State of Nebraska; and if such person, association or corporation does not maintain an office within the State of Nebraska, then such notice shall be served by the publication thereof in some legal newspaper in the county in which the place of diversion of said water appropriation is located, for four consecutive weeks prior to said date of hearing and a copy of such notice shall further be served by personal service, or by sending the same by registered mail to all land owners under such water appropriation, as shown upon the records of the county clerk or register of deeds office of the county in which the land is situated under said water appropriation. At such hearing the sworn report made by the secretary, assistant secretary or superintendent shall be prima facie evidence for the forfeiture and annulment of such water appropriation, and if no one appears before said board at such time and place as fixed in the notice to contest the same, such water appropriation shall be declared forfeited and annulled; and if some one interested appears and contests the same, the said board shall hear evidence and if it appears that *such water appropriation has not been put to a beneficial or useful purpose, or having ceased to be used for such purpose for more**

than three years, the same shall be declared canceled and annulled. An appeal may be taken from the decision of the state board upon said hearing, the same as in other cases provided for by law for appeal from the state board of irrigation, highways and drainage, to the district court of the county at which the point of diversion of such water appropriation is situated. [*Italics ours.*]

Nebraska Session Laws 1911, page 303.

This section undoubtedly is that referred to by the supreme court of Nebraska (though not cited) as an amendment made in 1911 to section 18 of the irrigation act of 1895 (see *ante* at close of page 83, P. R. 336). It will be referred to *infra* where, in argument, we analyze the opinion of that court now under review.

SYNOPSIS OF ARGUMENT.

Preliminary.

We rely on all the ten assignments or specifications of error. They require reversal of the supreme court of Nebraska with instructions to affirm the decree of the district court. We do not discuss said assignments *seriatim*, but in connection with facts and principles of law to which they severally relate.

In limine, some statements of the substantive law concerning the subject matter will be submitted. When in stating general principles applicable to an appropriation and a priority we refer to a canal or its construction, we intend to have impliedly included other needed physical structures such as a diverting dam, headgate at point of diversion, headgates for distributing ditches or laterals, flumes and the like. We understand other appliances than canals may be used to effect an appropriation, e. g., a dam in a public stream to cause overflow on adjacent meadows, a reservoir even in the bed of a ravine, canon or water course, rams, pumps, or the like, to take water from its natural channel, also water wheels and other like appliances to propel machinery for mills, etc. As well stated by the supreme court of Colorado:

“The true test of appropriation of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same or making such application is immaterial.”

Thomas vs. Guiraud, 6 Colo. 530.

In what follows, we omit reference to appropriations made by other means than canals, as inapplicable to the present case.

POINTS AND AUTHORITIES.

I.

An Appropriation of Water with Its
Priority is Real Property.

The right of appropriation of water in arid and semi-arid regions, like the analogous right of mill owners etc. gained by prescription at common law, constitutes an incorporeal hereditament, sometimes of greater value than the land, otherwise desert, which it renders fertile. The relative date of an appropriation, or its priority, if comparatively early, usually constitutes its chief element of value and is of itself a vested real property right. This is especially true when the natural source of supply greatly fluctuates and at low stages when most desired is inadequate to meet the needs of all appropriators. It follows, for a state through any of its agencies to recognize and to enforce a wrongfully antedated priority or an appropriation wrongfully increased in quantity, correspondingly deprives the owners of appropriations of later date of a vested property right of great utility and exchangeable value. Its relative *status*, if of early date, is usually the most essential element, the most prominent feature of this class of real property.

For further discussion of this point see pages 161-165, *infra*.

Citations.

- Kinney on Irrigation and Water Rights, 2nd ed.,
vol. 2, sec. 768, pp. 1326-7;
Ibid, Sec. 769, pp. 1328-9;
Wyatt vs. Larimer & Weld Irr. Co., 18 Colo. 298,
307 (36 Am. St. 280);
Seven Lakes Res. Co. vs. New Loveland & Greeley
I. & L. Co., 40 Colo. 382;
Union Colony vs. Elliott, 5 Colo. 371, 381;
Neilson vs. Parker, 19 Ida. 727;
Conant vs. Deep Creek etc. Co., 23 Utah 627 (90
Am. St. 721);

- Pacific Yacht Club vs. Sausalito Bay Water Co.,
98 Cal. 487;
Fritz vs. Camp, 94 Cal. 393;
Taylor vs. Hulett, 15 Ida. 265 (19 L. R. A. n. s.
535);
Guthiel Park Inv. Co. vs. Montclair, 32 Colo. 420;
Rickey Land & Cattle Co. vs. Miller & Lux, 81 C.
C. A. 207 (152 Fed. 11, 13-14);
Willey vs. Decker, 11 Wyo. 496 (100 Am. St. 939);
Smith vs. Denniff, 24 Mont 20 (81 Am. St. 408);
Tucker vs. Jones, 8 Mont. 225;
Sweetland vs. Olson, 11 Mont. 27;
Simmons vs. Winters, 21 Ore. 35 (28 Am. St. 727);
Hindman vs. Rizer, 21 Ore. 112;
Clough vs. Wing, 2 Ariz. 379-383;
Millheiser vs. Long, 10 New Mex. 99;
Bliss vs. Grayson, 24 Nev. 422;
Isaacs vs. Barber, 10 Wash. 124 (45 Am. St. 772);
Benton vs. Johncox, 17 Wash. 277 (61 Am. St. 912);
Tolle vs. Coreth, 31 Tex. 362 (98 Am. Dec. 540,
542);
Mud Creek etc. Co. vs. Vivian, 74 Tex. 170;
Bigelow vs. Draper, 6 N. Dak. 152;
Crawford Company vs. Hall, 67 Neb. 325 (60 L.
R. A. 889, par. 21 and 25 of syllabus);
U. S. Rev. Stats., sec. 2339;
Basey vs. Gallagher, 20 Wall. 670, 686.

II.

Completed Appropriation with Its Priority Date.

This topic we thus subdivide:

1.

Extent of User Defines Amount of Completed Vested Appropriation.

An appropriation is not completed, perfected or fully vested until the water is applied to the intended beneficial use. Its quantity is determined by the use. Within this rule an appropriation cannot exceed the capacity of the canal.

For further discussion of this point see pages 166-168, *infra*.

Citations.

- Crawford vs. Hall, 67 Neb. 325, 357, 363, 364;
Conley vs. Dyer, 43 Colo. 22, 28;
Gates vs. Settlers M. C. & R. Co., 19 Okla. 83 (91
Pac. 856, 858);
Hough vs. Porter, 51 Ore. 318 (98 Pac. 1084, syl.
par. 38);
Ibid, 98 Pac. 1084, 1087, syl. 46;
Platte Water Co. vs. Northern Colo. Irr. Co., 12
Colo. 525, 530-1;
Union M. & M. Co. vs. Dangberg, 2 Sawy. 450
(Fed. Cas. No. 14,370);
McGuire vs. Brown, 106 Cal. 660, 670 (30 L. R. A.
384);
Chiatovich vs. Davis, 13 Nev. 133;
Salina Irr. Co. vs. Salina Stock Co., 7 Utah 456;
Head vs. Hale, 38 Mont. 302;
Burnham vs. Freeman, 11 Colo. 601;
Kinney on Irrigation, sec. 745, p. 1290.

2.

One Canal May Have Many Appropriations.

A second, third, etc., appropriation may be effected by means of one canal based on (1) its enlargement or extension, (2) an increased quantity of water applied to use thereunder after a reasonable time has elapsed to define the quantity used on its first priority.

For further discussion of this point see pages 169-171, *infra*.

Citations.

Ft. Morgan L. & C. Co. vs. South Platte Ditch Co.,
18 Colo. 1, 4-5;
2 Kinney on Irrigation, etc., sec. 683, p. 1184;
Nichols vs. McIntosh, 19 Colo. 22, 24;
Farmers Highline C. & R. Co. vs. Southworth, 13
Colo. 111.

3.

*Priority May Date Back to Initial Step.
Conditions of This Rule.*

The date of an appropriation, i. e., its priority, may on certain conditions be fixed by some initial step, if there be reasonable diligence from that time onward to the final use. This subject is discussed *infra* at pages 171-172.

Citations.

2 Kinney on Irrigation, etc., 2nd ed., sec. 743, p.
1285;
Ibid sec. 748, p. 1294.
Sieber vs. Frink, 7 Colo. 148;
Ophir S. M. Co. vs. Carpenter, 4 Nev. 534 (97 Am.
Dec. 550);
Kelly vs. Natoma Water Co., 6 Cal. 115.

In applying said rule, following requisites must be present:

3 (a).

Initial Act.

There must be an initial act whereby there is given to rivals actual or constructive notice of the would-be appropriator's intention to divert or segregate for a designated beneficial use a certain quantity of water. The posting at a designated place, or recording it, or both, of a written notice outlining the intended use, its extent, the means of effecting it, and similar information, is treated as such initial act, when required by statute, local regulation or custom. This subject is discussed *infra* at pages 172-173.

Citations.

2 Kinney on Irrigation, etc., secs. 746-7, pp. 1290-1294, and cases there cited.

3 (b).

Diligence in Construction.

Poverty no Excuse.

Construction work of the necessary canal must begin within reasonable time after the initial act, followed by the diligent prosecution of such work to completion. The diligence required is that of one financially able to proceed. The provision in section 9 of the Nebraska irrigation act of 1889 requiring such work to be prosecuted "diligently and uninterruptedly to completion unless temporarily interrupted by snow or rain," adopts this rule.

Under section 9 of said act of 1889, 60 days was the time for beginning construction work to enable the priority to relate to the date of posting and recording notice. This subject is discussed *infra* at pages 173-175.

Citations.

Water Co. vs. Kidd, 37 Cal. 311, 313;

Ophir S. M. Co. vs. Carpenter, 4 Nev. 534, 545-6,
et seq. (97 Am. Dec. 550);

Mitchell vs. Amador C. & M. Co., 75 Cal. 464 (17 Pac. 246, 251);
Kimball vs. Gearhart, 12 Cal. 28;
Davis vs. Gale, 32 Cal. 32;
Cole vs. Logan, 24 Ore. 304 (33 Pac. 568, 570-1).

3 (c).

Carriage to Place of User.

There must be the act of conducting with diligence and continuity when needed a definite quantity of water to the place of intended use. This subject is discussed *infra* at pages 175-176.

3 (d).

Beneficial Use.

Actual beneficial use must follow, which for irrigation in Nebraska is limited to one second-foot for 70 acres. This subject is discussed *infra* at pages 176-177.

3 (e).

Each Appropriation, How Measured.

The quantity of any one appropriation is measured by what is diverted and used as above indicated.

4.

Effect of Being Dilatory.

Lack of reasonable diligence in the order of said steps may correspondingly postpone the priority date.

Citations.

Same as under 3 (b) and 3 (c) *supra*.

5.

*Liberal Time for Application
on Certain Conditions.*

If the matters above referred to as (a), (b) and (c) of subdivision 3 have all been accomplished with reasonable diligence, a canal owner whose original intention was to sell the use of water to farmers or like ultimate users is conceded further reasonable time in which to apply the final measure of his appropriation, i. e., the amount actually used. To apply this liberal rule, said canal owner must on completion of his canal with diligence, be constantly able, ready and willing to deliver water from his canal to all land owners desiring to purchase. The delay must be theirs, not his. However, the time conceded to make said ultimate test after completion of works in such cases cannot exceed the prescriptive period defined by local statute—in Nebraska ten years. This subject is discussed *infra* at pages 177-178.

Citations.

Nevada Ditch Co. vs. Bennett, 60 Am. St. 777, and
Monographic Note.

III.

Application of Said Rules to Appropriations of
Defendants in Error.

1.

*Canal Constructed Smaller Than Stated
in First Notice.*

The posting and recording on September 16, 1887, by their grantor, of its notice of intention to construct an irrigating ditch of stated dimensions—40 feet wide on bottom and 4 feet of water depth—followed by beginning, in the spring of 1888, and continuing construction work within the next five years, to make a ditch of less dimensions than so noticed, without any further such work

until August, 1905, must limit the first appropriation of the Farmers canal (1) to the capacity of the ditch as so constructed prior to 1894, (2) to one second-foot for 70 acres of land susceptible of irrigation under it, (3) within said limits to the area actually irrigated prior to its enlargement and extension.

2.

Second Notice Later Than Other Canals.

The posting and recording on November 17, 1890, of a second notice, stating an intention to make said Farmers canal of capacity to carry an additional quantity of 200,000 miner's inches—4,000 second-feet—was merely an initial step or act, which if all the other steps had been taken with reasonable diligence, would have given its owner a second appropriation with priority dating from November 17, 1890, junior to the priorities of those plaintiffs in error who severally own the Minatare, Winters Creek and Enterprise canals.

3.

*No Construction Work for 15 Years
Under Second Notice.*

Since there was no construction work until August, 1905, on the canal to enlarge it, or even to make it of the size designated in the notice of September 16, 1887, no second appropriation for any quantity of water was or can be based on said second notice. Since the appropriations of all plaintiffs in error, as fully perfected, antedate the construction of said enlargement and extension, the appropriation of the Farmers canal of earlier date than all of theirs, is that specified in paragraph 1 of this point.

4.

*Rights of Litigants in Inchoate Stage
on April 4, 1895.*

On April 4, 1895, the only appropriation then contingently vested by means of said Farmers canal was that limited as above. At that time the appropriations of dates admitted now to belong to the respective plaintiffs in error (save those pertaining to the Gering and Alliance canals) were also in an inchoate stage, because more time was justly allowable to increase the irrigated area under each of their canals.

5.

*First Appropriation of Farmers Canal
Less Than 29 Second-Feet.*

On the admitted facts the capacity, length, etc., of the Farmers canal for more than ten years before its enlargement and extension, were utilized to irrigate not more than 2,000 acres, requiring only 28.57 second-feet, and were susceptible of irrigating only 5,661.5 acres, requiring about 81 second-feet. It follows, under settled principles of substantive law, its appropriation of earlier priority than 1905 should be limited to 28.57 second-feet.

• IV.

Premature in 1895-6, to Fix Amounts.

Since sufficient time had not elapsed on April 4, 1895—the date of the Nebraska irrigation act of 1895—to apply the doctrine of relation as to the beneficial use of water under the canals then constructed or partially constructed by the several litigants, it was proper for administrative officers to wait for periods varying according to initial acts incident to each canal, before determining for their purpose of police control how much water should pertain to each appropriation. It was appropriate, however, to take initial steps to ascertain the dates of said respective appropria-

tions and the quantities claimed as a limit which might be reached by each through the exercise of proper diligence, though the amount which would be so used was not then capable of definite ascertainment. The only purpose of said initial determination or any adjudication by the state board was to aid it in granting permits for new diversions. This point is discussed at pages 178-179, *infra*.

V.

Intention of Secretary and State Board.

The Farmers Canal Company had constructed, prior to April 4, 1895, a canal of said limited capacity with only 5,661.5 acres susceptible of irrigation thereunder; it had then discontinued further construction work thereon and was not able or ready to continue the same. On September 19, 1896, it filed with the state board of irrigation, its claim to the waters of the state of Nebraska, showing the then partially constructed portion of its canal, and of its own motion requested five years from April 4, 1895, in which to complete application of water to beneficial use.

The secretary of said board did not by his opinion allow, adjudicate, or intend to allow or adjudicate to said company, a completed vested appropriation for any specified quantity of water of any priority date. His opinion was intended only to recognize as then belonging to said company an inchoate appropriation to date by relation back to September 16, 1887, the amount of which should be settled later. This is clearly shown by the 2nd and 3rd limitations and conditions in the opinion (41-2, P. R. 266), fixing a liberal time to complete the user and fixing a limit to possible amount which by diligence could be used before September 1, 1904.

By affirming said opinion, the state board of irrigation must have had the same intention as that appearing on the face of the opinion itself. This subject is discussed *infra* at pages 179-186.

Citations.

Russell vs. Place, 94 U. S. 606;
Cromwell vs. Sac County, 94 U. S. 351, 355, 356;
Lewis vs. Ocean Nav. & P. Co., 125 N. Y. 341, 348;
Washington Gaslight Co. vs. Dist. of Columbia,
161 U. S. 316, 329;
Kleinschmidt vs. Binzel, 14 Mont. 31.

VI.

Equal Protection of the Laws.
Due Process of Law
Judicially Defined.

1.

*The Equivalent of Law of the Land
in Magna Charta.*

This subject is discussed *infra* at pages 186-188.

Citations.

Holden vs. Hardy, 169 U. S. 366, 389-391;
Murray's Lessees vs. Hoboken Land Co., 18 How.
272, 276.
Ochoa Hernandez y Morales, 230 U. S. 139.

2.

Fundamentals of Justice Must be Present.

Citations.

Same as under 1 last *supra*.

3.

*Full Opportunity for Hearing, Notice of
Matters to be Heard.*

This subject is discussed *infra* at pages 188-189.

Citations.

Hagar vs. Reclamation District, 111 U. S. 701,
707-8;
McVeigh vs. U. S., 11 Wall. 259;

Windsor vs. McVeigh, 93 U. S. 274;
Hovey vs. Elliott, 167 U. S. 409;
6 Ruling Case Law, p. 453, sec. 449, and cases there
cited.

4.

*Necessity of Judicial Decision of
Judicial Question.*

This subject is discussed *infra* at pages 189-191.

Citations.

Chicago, M. & St. P. R. Co. vs. Minn., 134 U. S. 418,
456-7;
San Diego Water Co. vs. San Diego, 118 Cal. 556
(62 Am. St. 261).

5.

*Vested Property Right Cannot be Taken
Without Compensation.*

This subject is discussed *infra* at page 191.

Citations.

Bradley vs. Lightcap, 195 U. S. 1;
In re Lambert, 134 Cal. 626 (86 Am. St. 296, 301,
302, 304);
Stuart vs. Palmer, 74 N. Y. 188 (30 Am. Rep. 291);
Bennett vs. Davis, 90 Me. 105;
Underwood vs. The People, 32 Mich. 1 (20 Am.
Rep. 633).

6.

*Equal Protection Forbids Arbitrary
Discriminations.*

This subject is discussed *infra* at page 192.

Citations.

6 Ruling Case Law, 372, and cases there cited.

VII.

Intention of Secretary and Board Changed
by Excisions.

The supreme court of Nebraska by its opinion here under review, in effect excised from said opinion of said secretary and board those conditions contained therein by which the real intent of said officials was expressed, and also held it to be conclusive as against junior appropriators, and the courts as well. In so holding, said court *ex cathedra* created for said officials an "adjudication" (held by said court to be final and conclusive) they never made, and thereby in effect added to the senior appropriation of the Farmers Canal Company 1,103 second-feet of water and correspondingly decreased the aggregate appropriations of plaintiffs in error of junior date.

Assuming for purpose of this point only that if they had so intended, said secretary and state board in rightful exercise of a jurisdiction could have made a final and conclusive adjudication of effect such as said supreme court of Nebraska has by excision constructed, in fact the secretary and board made no such adjudication. It follows, said holdings of said court deprive plaintiffs in error severally of property of great value without due process of law and denies to them the equal protection of the laws.

For further discussion of this point see page 192, *infra*.

VIII.

If Said "Adjudication" was Unconditioned,
It is Void.

Assuming for purpose of this point only, that said state board *intended and assumed* conclusively to adjudicate and determine the rights acquired by the Farmers Canal Company to be what said supreme court of Nebraska holds was so adjudicated (i. e., a completed vested appropriation to 1,142.86 second-feet of water, with priority date, Sep-

tember 16, 1887), said "determination" or "adjudication" does not conclude plaintiffs in error as *res judicata* or otherwise, but as against them severally is void for reasons following:

1.

Not in Litigated Case.

Said assumed or supposed judgment or decree of said board was not rendered in any litigated or controverted cause or proceeding, but was a mere incident to a ministerial function.

For further discussion of this point see pages 193-196, *infra*.

Citations.

Crawford Company vs. Hall, 67 Neb. 325;
S. C., 60 L. R. A. 889, 890, 906, 907;
White vs. Farmers Highline C. & L. Co., 22 Colo.
191;
Farm. Inv. Co. vs. Carpenter, 9 Wyo. 110;
3 Blackstone's Com., 24-5;
1 Wait's Pr., 32;
In re Railroad Com'rs, 15 Neb. 679, 682;
Tyson vs. Washington County, 78 Neb. 211.

2.

*No Hearing or Notice Thereof Prescribed
by Legislature.*

The irrigation act of 1895 (the statute under which alone said board purported to act) did not provide for any hearings of or notice to parties, whose interests might be adversely affected. This subject is discussed *infra* at pages 196-208.

Citations.

- Coe vs. Armour Fertilizer Works, 237 U. S. 413, 424;
Central of Georgia R. Co. vs. Wright, 207 U. S. 127, 138;
Roller vs. Holly, 176 U. S. 398, 409;
Louisville & N. R. Co. vs. Central Stock Yards Co., 212 U. S. 132, 144;
Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S. 418, 456-7;
Paulsen vs. City of Portland, 149 U. S. 30;
Kentucky R. R. Cases, 115 U. S. 321;
McGavock vs. Omaha, 40 Neb. 64, 76-7;
Farm. Inv. Co. vs. Carpenter, 9 Wyo. 110;
Ryan vs. Tutty, 13 Wyo. 122.

3.

*Notice of Adjudication Prescribed by Legislature
Not Given.*

Said disobedience to the statute precluded plaintiffs in error from opportunity of statutory appeal to the courts.

Section 21 of the statute states that "it shall be the duty of the state board," on completing an adjudication, within 30 days to issue to each party concerned, a formal certificate setting forth *inter alia* the priority number of his appropriation, the amount of water so appropriated, and *the amount of prior appropriation*; also that said certificate "shall be transmitted" by registered mail to the proper county clerk for record; also that "it shall be the duty of the county clerk" within ten days after receiving said certificate, to record it in a specially prepared book and to notify the party in whose favor said certificate is issued of said record, and to transmit the certificate itself, when recorded, to such party. Section 22 permits any party aggrieved by such determination to appeal therefrom to the district court. Section 23 conditions said appeal by requiring the appellant *within 60 days from the state board's determination* to give undertaking, etc.

Since, under said section 21 an appellant might have less than 20 days after being advised of the final adjudication, in which to appeal to the court pursuant to sections 22 and 23, the three sections must be considered together, each being by its terms mandatory. The supreme court of Nebraska construes the statute as making the time of appeal mandatory, but those provisions on which alone it was possible for an appellant to know there was anything to appeal from, merely directory.

It is admitted, no certificate, informing any party of any determination of the amount of appropriations of earlier date than his own, was ever recorded with any county clerk, and that no notice of any such matter was given or obtained by any plaintiff in error until years after the so-called "conclusive adjudication."

It follows, an essential safeguard of property rights provided by the statute was not afforded plaintiffs in error.

This topic is further discussed *infra* at pages 208-209.

Citations.

Same as under subd. 2 last *supra*.

4.

Rules of Board Did Not Provide Due Process of Law.

If it be further assumed said board had power to prescribe rules to afford due process of law, the rules adopted failed so to provide, in following particulars:

4 (a)

Notice Only of a "First Hearing."

The only notice mentioned is that specified in rule 12 (34, P. R. 252) to be mailed to each claimant of record "at least ten days before the date of the first hearing announced," thus leading any party receiving said notice to suppose the "first hearing" would be followed by others of which he would later receive notice. This point will be discussed *infra* at pages 210-211.

Citations.

McGavock vs. Omaha, 40 Neb. 64, 76-7;
Other cases same as subd. 2 *supra*.

4 (b)

Hearing Only for Ex Parte Proof.

The notice actually mailed to interested parties (23-4 P. R. 255) stated:

“Claimants are expected to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearing the necessary proofs, if any be required, to sustain their claims.”

Any party receiving said notice with copy of said rules, on responding thereto, must have supposed his attendance was merely for the *ex parte* purpose stated in the notice and not to offer evidence against claims of rivals. This section is discussed *infra* at pages 211-212.

Citations.

Michigan Trust Co. vs. Ferry, 175 Fed. 667, 678;
In re Rosser, 41 C. C. A. 497;
In re Wood, 210 U. S. 246, 254.

4 (c)

*A “First Adjudication,” Not a Final One,
was Provided by Said Rules.*

Rule 3 of the board (32-3 P. R. 251), a copy of which was mailed to each claimant with the notice of “first hearing,” provided:

“The *first adjudication* of the rights of claimants shall be conducted for the purpose of determining the validity of claims; the land or territory covered in the case of irrigation canals; the date when work must be completed in the case of *incompleted canals*; and the time within which the water claimed must be applied to the beneficial use for which it is appropriated.”

Any party receiving the only notice sent, and with it a copy of said rules, would be led to conclude (1) that the "first adjudication" (if any should result from the notice served) would be limited to matters specified in said rule 3; (2) that it would not constitute a final determination of completed or perfected appropriations, for which said rules made no provision; and (3) that probably at some later date (after reasonable time had elapsed for application of so much of the water claimed as should be actually used,) a second or later adjudication would occur to aid said board in its administrative duties under rules at such future time to be prepared. This subject is discussed *infra* at pages 212-213.

Citations.

Same as under 4 (b) last *supra*.

4 (d)

*The Blank Form of "Claim" Not Adapted
to a Final Adjudication.*

The blank form of "Claim for the waters of the State of Nebraska," prepared by said board and sent to the several ditch owners to be filled out and verified, on its face purported to call for an *ex parte* statement by each claimant of what it claimed, including what time it desired to complete its canal and put water diverted thereby to beneficial use. Like rule 3 of said board, it was adapted to a preliminary investigation, but not to be considered as either pleading or evidence incident to a conclusive and final adjudication then imminent. If construed to be the latter and with the early posted notice of intention, the only record required, it lacks every essential of due process of law.

This subject is discussed *infra* at pages 213-214.

5.

Board Did Not Follow Its Own Rules.

Such rules as said state board and its secretary did adopt to give some semblance of notice of their proceedings subsequent to the taking of *ex parte* statements of claim and evidence, were disregarded in following particulars:

Rule 11 adopted by its secretary on authority of said board (35, P. R. 252) provides:

“Copies of opinions handed down by the secretary in matters of adjudications * * * shall, upon the same day as the date of such opinions, be mailed to *parties in interest*.”

It is admitted a copy of the secretary's opinion *in re* the Farmers canal was mailed only to the Farmers Canal Company and that no notice either of said opinion, or of the affirmance thereof, or of the amount awarded to said prior appropriator, was provided or given to any plaintiff in error at any time, though all of them were necessarily “parties in interest,” whereby plaintiffs in error were deprived of opportunity to apply for the rehearings and appeals named in said rules. This subject is discussed *infra* at pages 215-217.

Citations.

Same as under VIII 2 *supra*.

6.

*Adjournment Without Notice and
Without Day.*

The only notice given was one of a “first hearing,” instructing each party to present *ex parte* proofs, if any he had, to support his own claim, but no more. No notice was given of time to present adverse evidence, to cross-examine witnesses, to argue debatable matters, or stating when anything would be determined. No continuance of “the hearing” was had or announced. Jurisdiction further to proceed was lost when said hearing was adjourned with-

out day. A subsequent determination *in camera* by said secretary and board was *coram non judice*. This subject is discussed *infra* at pages 217-218.

Citations.

Wetmore vs. Karrick, 205 U. S. 141, 158.

7.

*Adjudication Unsupported by Pleading
or Evidence.*

The supreme court of Nebraska in this case holds the posting and recording on September 16, 1887, is the "pleading" of a "claim" to an appropriation as of that priority date. It is admitted, said posted notice stated an intention to construct a ditch of bottom width 40 feet and of water depth 4 feet, without indicating its length or the acreage to be irrigated therefrom. The assumed "adjudication" that 1,142 second-feet of water had been appropriated of that priority was a departure from "the pleading," or "claim of intention," of said early date. The board, therefore, "determined" and "adjudicated" what was in excess of its jurisdiction. This point is discussed at pages 218-227.

Citations.

Lincoln Natl. Bk. vs. Virgin, 36 Neb. 736;
Vorce vs. Page, 28 Neb. 294;
Small vs. Collins, 5 Delaware Ch. 234;
Hale vs. Bozeman, 60 Miss. 965;
Lang Syne etc. Co. vs. Ross, 20 Nev. 127;
S. C., 19 Am. St. 337.

8.

Further Departure from Pleading and Record.

Section 20 of the irrigation act of 1895 (ante p. 115) provides in effect that more than one appropriation may be made by means of a single canal "by means of enlargement" thereof, to be determined in like manner as one effected by means of its initial construction. If it be assumed that the second posted notice of the Farmers Canal Company of date November 17, 1890, for an additional 200,000 miner's inches

(4,000 second-feet) is a sufficient "pleading" for an "adjudication" of a property right under the act of 1895, and that an enlargement and extension of the Farmers canal begun fifteen years after said notice was published conformed to said pleading, to "adjudicate" any part of said additional 4,000 second-feet as of date earlier than November 17, 1890, was in excess of the jurisdiction of said state board on its record.

IX.

Vested Prescriptive Rights Taken by
Judicial Fiat.

The state of Nebraska deprived these plaintiffs in error of a vested right in real property without compensation, and hence, without due process of law, and denied to them the equal protection of the laws, for reasons following:

Assume (in face of admitted facts) three things: (1) that the notice posted and recorded September 16, 1887, disclosed intention of the Farmers Canal Company to build a canal 80 miles long and of sufficient size to carry water to irrigate 80,000 acres; (2) that before it ceased constructive work in fall of 1893, it had built such canal and had applied water to irrigate said 80,000 acres; (3) that in April, 1896, a judicial tribunal of undoubted jurisdiction, on correct procedure had conclusively adjudicated that said company had become vested with an appropriation for 1,142.86 second-feet of water of date September 16, 1887.

Consistent with said assumptions, the facts are, that since January 1, 1894, until August, 1905—more than 11.5 years—said canal was in such physical condition that only 5,661 acres were susceptible of irrigation therefrom, and only 2,000 acres thereof were so irrigated.

On said assumed conditions and admitted facts, on August 1, 1905, it was the settled law and rule of property in Nebraska that on a ten years' continuous non-user of any part of a once vested appropriation, said portion thereof *ceased*, i. e., no longer existed. Said rule of property was

based on sections 2 and 12 of the irrigation act of 1889 (*ante* pp. 108 and 109), and section 18 of the irrigation act of 1895 (*ante* p. 115), construed in connection with the ten-year prescriptive period fixed by section 6 of title 2, Nebraska code of civil procedure (*ante* pp. 125-7). The supreme court of Nebraska, in effect, so held in *Farmers Canal Company vs. Frank*, 72 Neb. 136, in a proceeding initiated in 1902, before said non-user had continued for 10 years.

Under said settled law of Nebraska the appropriations of plaintiffs in error (all admittedly vested before 1904), were, on said assumptions, until that year subject to the hazard that the owner of the Farmers canal might lawfully renew the full amount of its assumed diversion and use on its earlier priority for the full amount of 1,142 second-feet. Because of ten years non-user of 1,103 second-feet of said assumed once existent senior priority, plaintiffs in error on and after January 1, 1904, were free from hazard or subordination thereto. That freedom was a vested property right, which was not invaded until just before this suit began in August, 1909.

The state of Nebraska legislating, in effect, through its supreme court, in this case, refused to apply said previously settled law. By its judicial fiat it revived or galvanized into renewed life a priority antedating those of all plaintiffs in error to the extent of 1,103 second-feet; thereby it correspondingly deprived plaintiffs in error of a then vested relative *status* of great value.

This subject is discussed *infra* at pages 227-231.

Citations.

- Farmers Canal Co. vs. Frank, 72 Neb. 136;
- Smith vs. Hawkins, 110 Cal. 122;
- Hall vs. Blackman (Ida.), 68 Pac. 21;
- 3 Farnham, Waters and Water Rights, pp. 2106-7,
sec. 680-a, and cases there cited;
- Galveston etc. Ry. Co. vs. State, 17 S. W. 67, 71;
- Bywaters vs. R. R. Co., 73 Tex. 627;

In re R. R. Co., 72 N. Y. 248;
Transit Co. vs. Brooklyn, 78 N. Y. 530;
In re R. R. Co., 75 N. Y. 338;
In re R. R. Co., 81 N. Y. 71;
Farnsworth vs. Ry. Co., 92 U. S. 66;
Normal School Dist. Board vs. Blodgett, 155 Ill.
441 (46 Am. St. 348);
Lawrence vs. Louisville, 96 Ky. 595 (49 Am. St.
300);
Woart vs. Winnick, 3 N. H. 473 (14 Am. Dec. 384);
Rockport vs. Walden, 54 N. H. 167 (29 Am. Rep.
131);
Willoughby vs. George, 5 Colo. 80;
McEldowney vs. Wyatt, 44 W. Va. 711 (45 L. R.
A. 609).

X.

No Estoppel by Conduct.

The supreme court of Nebraska (assuming it had erred on all other points) asserts an estoppel based (in addition to the void "adjudication" of 1897, and its erroneous interpretation in the Frank case), only on these further facts: (1) that for four years from August, 1905, defendants in error expended large sums to enlarge and extend the Farmers canal; (2) plaintiffs in error gave no warning that the "claim" of earlier priority date to no more than 29 second-feet of water would be resisted.

From these facts alone said court draws the unfounded inference that plaintiffs in error "stood by in silence" and thereby misled defendants in error to make expenditures which might otherwise have not been incurred. The court ignores (a) the lack of any admission or stipulation to the effect that said expenditures would not have been made had said warning been given; (b) that plaintiffs in error were in continuous possession of all the rights they claim, which constitutes actual and constructive notice of their rights; (c) that the expenditures were consistent with the use of

the canal on a new and junior priority, since during high water stages there always is an adequate supply to insure successful grain farming; (d) that all are presumed to have equal knowledge of fundamental substantive law.

This subject is discussed *infra* at pages 232-238.

Citations.

Erickson vs. First Nat'l Bk., 44 Neb. 722;
Scrogin vs. Johnson, 45 Neb. 714;
Slayden vs. Mitchell, 42 Neb. 861;
Neb. Mtg. L. Co. vs. Van Kloster, 42 Neb. 476;
B. & M. R. R. Co. vs. Harris, 8 Neb. 114;
Schreiber vs. Platt, 19 Neb. 627.

This holding amounts by indirection to the taking of the property of the plaintiffs in error and transferring it to defendants in error without compensation, and hence without due process of law, for the following reasons:

1.

*The 14th Amendment Protects the
Property Right.*

Prohibitions of the fourteenth amendment are directed to a state and to all branches of its government, including the judiciary. If a statute of Nebraska (retroactive in operation) had provided that an estoppel should exist because of like premises, it would have been unconstitutional as a cloak to cover confiscation. *A fortiori*, that is true of judicial legislation, which is always retroactive. This subject is discussed *infra* at pages 239-242.

Citations.

Bradley vs. Lightcap, 195 U. S. 1;
Greenough vs. Greenough, 11 Pa. St. 489 (51 Am.
Dec. 567);
C. B. & Q. R. Co. vs. Chicago, 166 U. S. 226;
Hovey vs. Elliott, 167 U. S. 409.

2.

*The Nebraska Court Deprives Plaintiffs in Error
of All Remedies.*

The judgment of the supreme court of Nebraska, with the opinion on which it is based, if not reversed, being predicated on other grounds as well as the said asserted estoppel by conduct, deprives plaintiffs in error of all remedy, either in equity by injunction, or at law for damages. If any estoppel *in pais* had been pleaded, which we do not concede, it was aimed only at the remedy by injunction.

This subject is discussed *infra* at page 242.

XI.

*Alleged Estoppel in pais Based on Void
Adjudications.*

The estoppel by conduct asserted by the supreme court of Nebraska under review is not predicated on a non-federal ground sufficient in itself to sustain the result reached.

1.

It is Not Independent.

It is not independent of the void "adjudication" of the state board or the erroneous construction thereof in *Farmers Canal Company vs. Frank* and in this case, but makes the fact of said proceedings before the state board and the construction thereof in said *Frank* case (to which plaintiffs in error were not and could not have been parties) its starting point, and one of its chief elements.

This subject is discussed *infra* at pages 243, 245-6.

Citations.

See cases under XI 3 (c) *infra*.

2.

Interwoven with Void Proceedings.

The rights claimed by plaintiffs under the federal constitution are interwoven with the question of estoppel at all points.

This subject is discussed *infra* at page 243.

3.

Attempt to Evade Federal Questions.

The doctrine of estoppel announced by said court constitutes a palpable effort to evade federal review on federal questions.

3 (a)

It is Unsupported by Any Principle of General Law.

This subject is discussed *infra* at pages 244-245; also 232-238.

Citations.

Kendall vs. Tracy, 64 Vt. 522;
Brandt vs. Va. Coal & Iron Co., 3 Otto 326;
Henshaw vs. Bissell, 18 Wall. 255, 271-2;
Philadelphia etc. R. Co. vs. Dubois, 12 Wall. 47.
Lower Latham Ditch Co. vs. Louder Irr. Co., 27
Colo. 267.
Priewe vs. Wis. S. L. Imp. Co., 103 Wis. 537 (74
Am. St. 904).

3 (b)

*The Court Misstates and Misinterprets Both
the Pleadings and Stipulated Facts.*

This subject is discussed *infra* at pages 232-238, 245.

Citations.

Same as under 3 (a) last *supra*.

3 (c)

*This Court Will Not be Deprived of Jurisdiction
by Any Subterfuge.*

This point is discussed *infra* at pages 245-246.

Citations.

Bradley vs. Lightcap, 195 U. S. 1;
Murdock vs. Memphis, 87 U. S. 590;

Terre Haute & I. R. Co. vs. Indiana, 194 U. S. 579;
Louisville Gas Co. vs. Citizens Gas Co., 115 U. S.
683;

Schlemmer vs. Buffalo Ry. Co., 205 U. S. 1;

Bowe vs. Scott, 233 U. S. 658;

Vandalia Ry. Co. vs. Indiana, 207 U. S. 359;

Garr, Scott & Co. vs. Shannon, 223 U. S. 468;

Klinger vs. Missouri, 13 Wall. 257;

McCullough vs. Virginia, 172 U. S. 112.

XII.

Errors in Opinion of Supreme Court of
Nebraska.

We maintain the opinion and judgment of the supreme court of Nebraska in this case in its introductory portion and in each of its subdivisions numbered to accord with syllabus paragraphs contains manifest error, as follows:

A.

In Failing to Analyze Board Rules.

In its introductory part and throughout, it omits to analyze or to state in any detail the rules adopted by the state board of irrigation and its secretary. It assumes, without analysis thereof, that due process of law was provided by said rules so as to give color to the interpretation by said court of the "adjudication" or "determination" of said board in 1896 *in re* the Farmers canal appropriation.

1.

*In Assuming Readiness of Farmers Canal After
1893 to Furnish Full Amount.*

After partially stating the rule of substantive law referred to in Subdivision 5 of Point II *supra*, it assumes that the several owners of the Farmers canal were ready, able and willing since 1893 to furnish water in excess of 81 second-feet and up to 1,142 second-feet, to land owners under its then constructed line of canal. Said assumption is

contrary to admitted facts, including those elsewhere stated in said opinion.

2.

In Holding Statute Provided Due Process.

In holding that the irrigation act of 1895 provided due process of law for a conclusive determination by said state board of property rights and of controversies which later arose concerning the relative priorities and amounts of appropriations initiated but only in formative stage when said act was passed.

3.

*In Holding Statute Implied Hearings and Notice,
Also That Board Rules Provided Therefor.*

In holding that where a statute under the police powers of the state authorizes an administrative board to make *ex parte* investigations to guide official conduct, which may affect property rights, and contains no provisions for hearings or argument of said matters or for notice to be given to property owners so affected, it implies a right to hearings and notice. Also, in holding that in the present case and under the Nebraska irrigation act of 1895, opportunity was afforded or a proper notice given pursuant to a procedure not prescribed by the legislature, but, it is said, authorized to be framed by the state board of irrigation, and that thereby due process of law was afforded to plaintiffs in error. We charge specific errors in that part of said opinion, as follows:

3 (a)

*Concedes, Statute Does Not Expressly Provide for
Notice. Omits Reference to Silence
de Hearings.*

While the court concedes that the statute in question contained no express provision for any notice

to persons whose property rights would be affected, the court omits to comment on the further fact that said statute contains no provision for any *hearings* or anything other than an *ex parte* investigation by an administrative board.

3 (b)

In Holding Proper Notice was Given.

In holding under the facts in this case that any proper notice was, in fact, given to plaintiffs in error requiring them to respond to anything but to a request to furnish *ex parte* evidence, each concerning its own claimed appropriation.

3 (c)

In Holding Board Rules Afforded Due Process.

In holding that the procedure actually adopted by the state board and by its secretary (which said opinion fails to analyze) was authorized by the legislature or (with or without such authorization) afforded due process of law to protect the property rights of the respective plaintiffs in error.

3 (d)

*In Holding Appearances to Offer Proofs, Waived
Other Vital Needs of Due Process.*

In holding that the appearance of some of the plaintiffs in error in response to a notice to present evidence each concerning its own claimed appropriation, authorized every subsequent proceeding therein, including the court's interpretation and change in meaning of the opinion of the secretary and "adjudication" or "determination" of said board concerning the Farmers canal appropriation.

4.

In Overstating Powers of Administrative Board.

In holding that the legislature of Nebraska had power to delegate the formulation of rules of procedure to affect property rights to an administrative board, and that the failure of the legislature to prescribe any procedure, hearing or notice did not render due process of law lacking so as to preclude any finality or conclusiveness either against the courts or interested parties, of any "adjudication" or "determination" of said state board.

5.

In Treating Posted Notices of Intention as Pleading of Performance.

In holding that a transcript of a posted and recorded notice of an intention to build a canal pursuant to a prior statute, constituted a "pleading" of a completed vested appropriation to water in support of a "conclusive adjudication" based upon *ex parte* affidavits concerning controversies which later arose about the relative amounts and priorities of rival appropriators.

6.

In Holding Certificate in Thirty Days After Decision Not Mandatory.

In holding that the limitation of thirty days within which to issue a certificate by the state board of irrigation under section 21 of the Nebraska irrigation act of 1895, is merely directory and that the failure to comply therewith was not a departure from due process of law. Said court ignored or overlooked the fact that without compliance with said section 21, plaintiffs in error were given no notice or knowledge, and therefore had no opportunity to appeal from the alleged "adjudication" complained of.

7.

*In Excising Conditions from Opinion of
Secretary and Board.*

In holding that the state board of irrigation under sections 15 to 27 of the Nebraska irrigation act of 1895, was without power (under its own rules providing for its "first determination") to impose time conditions and other limitations preliminary to a final ascertainment of the amounts and priority dates of appropriations; also in failing to analyze or consider the actual rules and procedure adopted by said state board, including its drafting a form for "claim for the waters of the state of Nebraska," demanding information as to when the works of the respective claimants would be completed and what would be a reasonable time within which to apply water.

8.

In Changing Law in re Non-User.

In holding that under the facts stipulated the disputed part of the early appropriation now claimed by defendants in error, if it ever existed, did not cease by non-user for more than ten years.

9.

*In Holding ex parte "Evidence" Supports
"Pleading."*

In misconstruing the effect of the posting and recording of notices of intention to appropriate water, as provided in the Nebraska irrigation act of 1889, and in effect holding that *ex parte* evidence (showing that the Farmers canal referred to in such notices of intention was uncompleted to size specified in the first notice), justified an adjudication to its claimant of an appropriation dating back to said first notice of more water than was proposed or intended to be diverted as specified therein.

159

In Finding Estoppel Without Any Ground.

In holding that plaintiffs in error are estopped by conduct after the decision of said court in June, 1904, concerning the then alleged *status* of the Farmers Canal Company in favor of Roberts Walker, in Farmers Canal Company vs. Frank, 72 Neb. 136, (a proceeding in which no plaintiff in error was or could have been a party), because after said decision, it is asserted by said court they "stood by" without taking steps to prevent defendants in error (assigns of said Walker), from making expenditures to enlarge and extend said Farmers canal; also in all its reasoning and conclusions incident to what said court asserts to be an estoppel by conduct.

ARGUMENT.

Preliminary.

In view of the "Points and Authorities" last preceding, further argument is perhaps unnecessary to advise the court of every contention on which plaintiffs in error rely for reversal. Out of what may seem excess of caution, and not unmindful of exposing ourselves, perhaps justly, to the criticism of undue prolixity, we assume to present further elaboration. The discussion for easy cross references will proceed in the same order of topics and subdivisions of each as heretofore noted.

[N. B.—In what follows, figures alone in a parenthesis refer to previous page of this brief; where figures both precede and follow the letters P. R., the first figures refer to previous page of this brief, the last figures to pages of printed record, e. g. (41-2, P. R. 261-266) refers to pages 41 and 42 of this brief and to pages 261 to 266 of printed record.]

I.

An Appropriation, with its Priority, is Real Property.

A careful text writer has well said:

"The distinct, exclusive, usufructuary estate acquired by an appropriator to the use of water . . . is property of the highest order, and oftentimes of the highest value. The water right is protected by the law as such, and is subject to all of the usual incidents of property. This property right in water is as important, as valuable and as extensive as the use to which it is applied, and especially so where that use is the irrigation of land. . . . The property in a water right consists not alone in the amount of water claimed under the appropriation, but also in the priority of the appropriation. It very often happens that the chief value of an appropriation consists in its priority over other appropriations from the same stream. Hence, to deprive one of his priority to appropriate would be to deprive him of a most valuable property right. A per-

fectured water right is a vested property right, and its value capable of estimation in money, and one which the law protects. A water right is such a property right that it comes clearly within the constitutional provisions that property shall not be taken or damaged for public or private use, except upon due process of law and upon just compensation."

Kinney on Irrigation and Water Rights, 2d Ed., Vol. 2, Sec. 68, pp. 1326-7.

The same learned author in the next section says:

"It is generally conceded by all of the authorities that a water right, or an interest in a water right, is real property, and it is so treated under all the rules of law appertaining to such property."

Kinney on Irrigation, etc., 2d Ed., Vol. 2, Sec. 769, pp. 1328-9.

A very large number of cases from all states in the arid and semi-arid regions are cited by the learned author.

In Colorado it has been held:

"A perpetual right to have a certain quantity of water flow through an irrigating ditch is an incorporeal hereditament descendable by inheritance, and a freehold estate."

Wyatt vs. Larimer & Weld Irr. Co., 18 Colo. 298, 307;

S. C. 36 Am. St. Rep. 280.

In the same state it has been further held:

"A priority to the use of water is a property right which is the subject of purchase and sale, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others."

Seven Lakes Res. Co. vs. New Loveland & Greeley I. & L. Co., 40 Colo. 382.

We call attention also to the following expressions of the same court:

"It must be remembered that these property rights in water are as important, as valuable and as extensive as the broad acres to be fertilized thereby; for without the one, the other is almost valueless."

Union Colony vs. Elliott, 5 Colo. 371, 381.

In Idaho it was held in a recent case that a water right is real property; further, that possession of such water right by diversion and use constitutes actual notice to any subsequent appropriator of water from the same stream or to an applicant for a permit from a state official, the court saying:

"The right to its use may by analogy be likened unto the doctrine that one purchasing real estate must take notice of those in possession, notwithstanding the recording statutes."

Neilson vs. Parker, 19 Ida. 727.

In Utah it has been held that an action to quiet and determine title and to establish the right to divert and use water is in the nature of an action to quiet title to real estate.

Conant vs. Deep Creek, etc., Co., 23 Utah, 627;

To the same point we cite:

Pacific Yacht Club vs. Sausalito Bay Water Co.,
98 Cal. 487;

Fritz vs. Camp, 94 Cal 393;

Taylor vs. Hulett, 15 Ida. 265;

S. C. 19 L. R. A. n. s. 535;

Guthiel Park Inv. Co. vs. Montclair, 32 Colo. 420;

Rickey Land & Cattle Co. vs. Miller & Lux, 81 C.
C. A. 207;

S. C. 152 Fed. 11, 13-14.

In Wyoming it has been held:

"The right of the prior appropriator to have the water flow in the stream to the head of his ditch is an incorporeal hereditament appurtenant to his ditch, and co-extensive with his right in the ditch itself."

Willey vs. Decker, 11 Wyo. 496;
S. C. 100 Am. St. Rep. 939.

The same doctrine has been announced in Montana.

Smith vs. Denniff, 24 Mont. 20;
S. C. 81 Am. St. Rep. 408;
Tucker vs. Jones, 8 Mont. 225;
Sweetland vs. Olson, 11 Mont. 27.

In Oregon, water rights are held to be real property subject to protection by the injunctive power of a court of equity.

Simmons vs. Winters, 21 Ore. 35;
S. C. 28 Am. St. Rep. 727;
Hindman vs. Rizor, 21 Ore. 112.

In Arizona, in an early case, occurs a very interesting statement relative to the ancient origin of the law of appropriation of water and of the great importance thereof in arid climes throughout all known history.

Clough vs. Wing, 2 Ariz. 379-383.

In New Mexico, suits in equity to quiet title where amounts and priorities of appropriations are in dispute are entertained.

Millheiser vs. Ling, 10 New Mex. 99;

In Nevada similar suits have occurred.

Bliss vs. Grayson, 24 Nev. 422.

In Washington such suits to determine conflicting rights to water between appropriators *inter sese* or between appropriators and riparian owners are not infrequent.

Isaacs vs. Barber, 10 Wash. 124;
S. C. 45 Am. St. 772;
Benton vs. Johncox, 17 Wash. 277;
S. C. 61 Am. St. 912.

In Texas like controversies have arisen.

Tolle vs. Coreth, 31 Tex. 362; 98 Am. Dec. 540,
542;
Mud Creek, etc., Co. vs. Vivian, 74 Tex. 170.

See also in North Dakota:

Bigelow vs. Draper, 6 N. Dak. 152.

In Nebraska, it was held that the right to the use of water when acquired by appropriation is, in its nature, a property right; also, where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian rights, appropriations, prescription or otherwise, a suit in equity to determine such rights and enjoin their infringement may be maintained.

Crawford Company vs. Hall, 67 Neb. 325;

S. C. 60 L. R. A. 889;

See par 21 and 25 of syllabus.

Congress in 1866 enacted:

"Whenever by *priority of possession* rights to *the use of water* for . . . agricultural . . . purposes have vested and accrued . . . the *possessors* and owners of *such vested rights* shall be . . . protected in the same." (Italics curs.)

U. S. Rev. Stats. 2339.

This court, by Mr. Justice Field, said relative to said act, with reference to the arid or semi-arid parts of the country:

"It is very evident that congress intended . . . to recognize as valid the customary law with reference to the use of water."

Basey vs. Gallagher, 20 Wall. 670, 686.

II.

A Completed Appropriation With Its Priority.

This topic will be discussed under subdivisions as heretofore stated (131-135):

1.

User Essential to Define Full Vested Appropriation.

No appropriation is completed or fully vested so as to determine its definite quantity under any priority until the water is applied to the intended beneficial use. The quantity of an appropriation is determined by the actual use and must be within the capacity of the canal. The supreme court of Nebraska heretofore said:

“An appropriator acquires title by appropriation and *application to some beneficial use*, and of which he cannot be deprived, except in some of the modes prescribed by law.” (Italics ours.)

Crawford Co. vs. Hall, 67 Neb. 325, 357.

And again:

“Every appropriator of water *who has applied it to the beneficial uses contemplated* by these several acts has acquired a vested interest therein.” (Italics ours.)

Crawford vs. Hall, 67 Neb. 325, 364.

The underlying rule is concisely stated thus:

“No principle in connection with the law of water rights in this state is more firmly established than that the application of water for beneficial use is essential to a completed appropriation.

Conley vs. Dyer, 43 Colo. 22, 28.

After stating sundry preliminary steps about the plats, notices, beginning and completing canal with diligence, and diversion, as constituting an inchoate right or interest, the same court proceeds on same page:

“And unless such beneficial use follows, the interest thus acquired does not ripen into an appropriation; the inchoate right terminates and the water goes to the junior claimants who have complied with all the requirements of the law.”

The rule is thus stated in Oklahoma:

"It seems the settled law in states where irrigation problems have been dealt with, that in order to acquire a vested right to the use of water * * * three things must concur: There must be the construction of ditches or canals for carrying the water; the water must be diverted into the artificial channels, and carried through them to the place of intended use; *it must be actually applied to beneficial uses*, and he has the best right who is first in time." (Italics ours.)

Gates vs. Settlers M. C. & R. Co., 19 Okla. 83
(91 Pac. 856, 858).

In an able opinion by Will R. King, Commissioner, the supreme court of Oregon holds:

"Beneficial use by and needs of the appropriator, and not the quantity originally diverted, nor the capacity of ditches constructed for the purpose, determines the limits of his rights.

Hough vs. Porter, 51 Ore. 318;
S. C. 98 Pac. 1084, syl. par. 38.

In the same case it is also held:

"Where an appropriator fails to use the full amount of water diverted, and for an unreasonable time delays in increasing his use, any subsequent increase, either in diversion or use thereof, is made subject to the intervening rights."

Hough vs. Porter, *supra*;
See syl. 46, 98 Pac. 1087.

In Colorado an interesting case arose illustrating the doctrine. It appears there had been a grant by the legislature of Kansas Territory in February, 1860 (before Colorado Territory was organized), on the strength of which appellant claimed to have acquired an exclusive right to the water of the South Platte river for agricultural and other purposes. The court, referring to the act of Congress of

July 26, 1866, and views of this court thereon, after stating that the appellant in said case had not diverted or used any water under said grant, says:

“The act says nothing about rights claimed by legislative grant without actual possession, appropriation or use.”

The appellant's contentions were held without merit.

Platte Water Co. vs. Northern Colo. Irr. Co., 12 Colo. 525, 530-1.

That the legislature of Nebraska adopted the correct test of an appropriation in its irrigation acts of 1877, 1889 and 1895 is manifest. The supreme court of Nebraska, referring to the act of 1877, said:

“It contemplated the appropriation of the waters of the streams and their use for irrigation * * * in conformity with the customs and usages prevailing in arid portions of the western country, where irrigation is essential to agriculture.” (Italics ours.)

Crawford Company vs. Hall, 67 Neb. 325, 363.

The thirteenth section of the act of 1889 (110) recognized that said general rule applies to the act of 1877 (107-8) by providing:

“All * * * canals * * * heretofore made * * * by means of which the waters of any stream have been diverted *and applied to any beneficial use* must be taken to have secured the rights to the waters claimed to the extent of the quantity which said works are capable of conducting” (110).

Since the stipulation of facts shows no water under the Farmers canal had been applied to any beneficial use before the act of 1889, no reservation in said Section 13 can apply to said canal.

Section 18 of the act of 1895 (115) providing that “when the appropriator * * * ceases to use * * * the right ceases,” in all logic shows, *without user there is no vested appropriation in water.*

2.

One Canal May Have Many Appropriations.

More than one appropriation may be effected by means of one canal based on either (1) its enlargement or extension, or (2) an increased quantity applied to beneficial use after passage of a reasonable time in which to limit the quantity used on its first appropriation. This point is very clearly illustrated by a case in Colorado, from which it appears that a certain company owned some 30,000 acres irrigable from its ditch constructed in 1882. It found it impracticable to obtain tenants or purchasers for the major part of its land. The trial court in adjudicating relative appropriations, awarded said company, as of date of construction of its canal, water within its carrying capacity sufficient to irrigate 30,000 acres. Quoting from counsel for said company (the present writer) to effect that said company, having expended nearly \$200,000 in constructing its canal, should have further time to apply water to have its priority date to 1882, the supreme court announces the law to be:

“That an appropriation is only consummated in case the water is finally applied to the use designated. No warrant is given for the entry of a decree in advance awarding a priority upon a diversion and promised use, as has been done in this case. To uphold such a decree will necessitate the abandonment of a cardinal principle. * * * The true test of the appropriation of water is the successful application thereof to the beneficial use designed.”

Fort Morgan L. & C. Co. vs. South Platte Ditch Co., 18 Colo. 1, 4-5.

In that case the trial court's decree was reversed. To the writer's personal knowledge, finally on new trial said company was limited as of its first priority date to 50 second-feet for land irrigated diligently after construction of its canal; it was awarded second priority of 164 second-feet, dating from April 15, 1888, when an enlarged application proceeded with diligence.

The legislature of Nebraska plainly indicates that a second appropriation may be effected by the enlargement or extension of a canal. This is manifest from the following part of section 20 of the act of 1895 (115).

“And the amount of any appropriation made by means of the enlargement of the distribution works heretofore, shall be determined in like manner.”

It is clear that on substantive law, an enlargement of the Farmers canal, begun in 1905, could not justify the contention that its early appropriation, initiated in 1887, can include the increased capacity and user based on said enlargement and extension. The point that several appropriations may be effected by means of a single canal is thus stated by Mr. Kinney:

“Several persons may make appropriations at different times and may use the same ditch, dam and other works for the diversion of water and for the irrigation of their respective tracts of land without surrendering, joining or merging their respective priorities. Hence, it follows that the same irrigating ditch may have two or more priorities belonging to the same appropriator or different appropriators.”

2 Kinney on Irrigation, etc., Sec. 683, p. 1184.

The same doctrine is announced in the following cases:

Nichols vs. McIntosh, 19 Colo. 22, 24;

Farmers Highline C. & R. Co. vs. Southworth, 13 Colo. 111;

Union M. Co. vs. Dangberg, 2 Saw'y 450 (Fed. Cas. No. 14,370);

McGuire vs. Brown, 106 Cal. 660, 670 (30 L. R. A. 384;

Chiatovich vs. Davis, 13 Nev. 133;

Salina Irr. Co. vs. Salina Stock Co., 7 Utah, 456;

Head vs. Hale, 38 Mont. 302;

Burnham vs. Freeman, 11 Colo. 601.

Mr. Kinney, referring to cases last cited, says:

“In other words, the new appropriation cannot be tacked onto the old one and relate back to its inception.”

2 Kinney on Irrigation, Sec. 745, p. 1290.

3.

*The Priority May Date Back to Initial Step.
Conditions of This Rule.*

The doctrine of relation is a familiar one in irrigation law. With the exception of the opinion of the supreme court of Nebraska, now under review, and possibly also in *Farmers Canal Co. vs. Frank*, 72 Neb. 136, decided in 1904, the doctrine has invariably been qualified throughout arid America by the proviso that from the first step the enterprise must be prosecuted with reasonable diligence.

The inception of that doctrine in general law is thus stated by Mr. Kinney:

“This doctrine is a fiction of law adopted by the courts solely for the purpose of justice; * * * but this doctrine is never applied when it would wrongfully defeat the rights of third persons.”

2 Kinney on Irrigation, etc., 2d ed., sec. 743, p. 1285.

The same learned author in the same book, in Section 745, page 1288, says:

“Although the appropriation is not deemed complete until the actual diversion or use of the water, still, if such work be prosecuted with reasonable diligence; the right relates back to the time the first step was taken.”

To this text he cites the following cases:

Sieber vs. Frink, 7 Colo. 148;

Ophir S. M. Co. vs. Carpenter, 4 Nev. 534 (97 Am. Dec. 550);

Kelly vs. Natoma Water Co., 6 Cal. 115.

The text writer then says:

“We adopt this statement of the rule as the present law on the subject in all jurisdictions.”

In Section 748 of the same work the author states:

“The application of the doctrine of relation depends largely upon the question of reasonable diligence in construction of the works necessary . . . and the actual application of the water to some useful purpose. Therefore, there are two essential elements absolutely necessary to permit the doctrine to be successfully invoked under the claim of an appropriator. These are, first, the priority in the inception of rights, and, second, reasonable diligence in its consummation. Therefore, its application is oftentimes fatal to the entire claim of one or more of the parties interested, and that, too, regardless of the fact whether the loser was prior in time in taking the first step or not.”

2 Kinney on Irrigation, etc., Sec. 748, p. 1294.

The steps to be taken with proper diligence under this doctrine of relation, are as follows:

3 (a)

The Initial Act.

This may be any act giving actual or constructive notice to would-be rivals of the claimant's intention to divert and segregate for beneficial use a certain quantity of water. When required by statute, local regulation or custom, the posting or recording, or both, of a written notice giving requisite information may be taken as an initial step, if followed by diligence in the other steps.

As stated by Mr. Kinney, in effect, in different jurisdictions different rules pertain as to what act shall be treated as the first step in the inception of the right. In some instances statutory notice by filing some map is required; in others, any first act for construction of works, which may

be a survey. In some instances it has been the purchase of a right of way or of a reservoir site.

2 Kinney on Irrigation, etc., secs. 746, 747, pp. 1290-1294, and cases there cited.

3 (b)

Diligence in Construction.

Poverty No Excuse.

Construction of the diverting works must start within reasonable time after the initial act and must be followed with diligent prosecution to completion. The diligence required is that of one financially able to proceed.

Water Co. vs. Kidd, 37 Cal. 311, 313.

In an early case in Nevada, the court says:

"If the labor of twenty men for three or four months in a period of two years and a half, constitutes diligence in the prosecution of such a vast enterprise as this, it is difficult, if not impossible, to designate the entire want of diligence. The manner in which this work was prosecuted certainly does not accord with what is generally understood to be reasonable diligence. Diligence is defined to be the 'steady application to business of any kind, the constant effort to accomplish any undertaking.' * * * The only matters in cases of this kind which may be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character. It would be a most dangerous doctrine to hold that ill-health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time or the diligence which is usually required in the prosecution of the work necessary for the purpose. We find no recognition of such doctrine in the law."

Ophir S. M. Co. vs. Carpenter, 4 Nev. 534, 545-6, *et seq.* (97 Am. Dec. 550).

In California, in an early case, the court says:

“The parties prosecuting the work must have the ability to complete the work within a reasonable time, and pecuniary inability to complete the work within a reasonable time, cannot be urged as an excuse for not prosecuting the work.”

Mitchell vs. Amador C. & M. Co., 75 Cal. 464
(17 Pac. 246, 251).

The case last cited has a noticeable analogy to that at bar, because a mortgagee, after foreclosure, sought to avail itself of the insolvency of the mortgagor. The court in said case cites with approval the following:

Kimball vs. Gearhart, 12 Cal. 28;
Davis vs. Gale, 32 Cal. 32.

In an early case in Oregon, the court says:

“The defendant pleads as an excuse for the delay, his inability to raise the necessary means to prosecute the work.”

And after quoting at length from Ophir S. M. Co. vs. Carpenter, 4 Nev. 534, *supra*, the court proceeds:

“The authorities clearly show that the claimant's pecuniary condition is not an excuse, and, that though the doctrine may seem harsh, it is nevertheless right. If the rule were otherwise, the prior settler on a creek, if he was ill or poor, could make a survey upon his claim to some desirable point above him on the stream, or give any notice of his intention to appropriate the water, and by so doing such work as his health would permit, could ultimately divert the water at such point and claim a prior right, without regard to the number of subsequent appropriators below such point of diversion or above it. * * * Hence it follows that defendant could not by the completion of his ditch in 1883 claim a diversion of water so as to relate back to 1871, and that the diversion at this point was subsequent to plaintiff's.”

Cole vs. Logan, 24 Ore. 304 (33 Pac. 568, 570-1).

The provision in Section 9 of the Nebraska irrigation act of 1889 (109), requiring such construction work to be prosecuted

“diligently and uninterruptedly to completion unless temporarily interrupted by snow or rain,”

clearly adopts this rule; it eliminates as an excuse for lack of diligence in prosecuting work such matters as financial inability of a person or corporation, or physical illness of an individual; it indicates that a “dog in the manger” policy cannot be followed; to get the benefit of the doctrine of relation the claimant must be financially equipped, otherwise the doctrine would not work justice, but injustice, to those who proceed with proper diligence and adequate financial means.

3 (c)

Carriage to Place of User.

After diligent construction of works, water must be conducted to place of intended use.

Section 9 of Nebraska irrigation act of 1889 (109) required a claimant “to prosecute work diligently and uninterruptedly to completion.” Section 10 of the same act (109) reads: “By completion is meant conducting the water to the place of intended use.” Section 11 (109) states that “By compliance with the above rules the claimant’s right to the use of the water relates back to the time the notice was posted.” Section 12 (109) states: “A failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies herewith, except as provided in the next section.” Section 13 of the same act provides that all canals * * * heretofore made (i. e. before taking effect of said act of 1889),

“by means of which the waters of any stream have been diverted and applied to any beneficial

use must be taken to have secured the right to the waters claimed to extent of the quantity which said works are capable of conducting * * * (110). [Italics ours.]

Since the Farmers canal had not in 1889, on the admitted facts, diverted or applied any water to beneficial use, it did not come within said legislative exception.

The definition of "completion" in section 10, taken in connection with sections 9, 12 and 13, forbids the doctrine of relation to be extended to the appropriation of defendants in error, except for water sufficient to irrigate 2,000 acres, i. e., a trifle less than 29 second-feet.

3 (d).

Actual Beneficial Use.

On this topic sufficient discussion has already been had. It is a matter of somewhat curious interest that with all the care taken by the supreme court of Nebraska in its opinion now under review, to refuse to apply these doctrines of substantive law to the case at bar, the court fearing, under the rule of equal protection of the laws, that its opinion might in some other controversy injure other litigants than plaintiffs in error, use this significant language:

"The true test of ultimate right to the water is its actual application to a beneficial use. * * * If not in use by prior appropriators, others may use it. No 'dog in the manger' policy can apply. If the non-use is continued for the statutory time the right ceases, may be forfeited as the statute provides, and more diligent users may acquire the right to its use under the authority of the board" (89, P. R. 340-1).

In referring to the words "under the authority of the board," the court ignores the fact that the requirement of completion by actual use with diligence was in the act of 1889; further, not only did that act, in its second section (108) state, "When the appropriator or his successor in interest ceases to use it * * * the right ceases"; also, the 18th section of the act of 1895 (115) contains this same

phrase, without anywhere requiring any authority of the board to enforce the statutory cessation of right by non-user for the statutory period of ten years. The first provision that the state board should act in matters of declaring forfeitures for cessation of use was in the act of 1911 (125-7), to which the court evidently refers without citing it.

This topic will be considered *infra* under Point IX (231).

3 (e).

*Any Appropriation is Measured by the Water
So Diverted and Used.*

The law in support of this assertion is sufficiently evidenced by cases and authorities cited under the previous subdivisions of this Point II.

4.

Effect of Being Dilatory.

The cases cited under subdivision 3, and particularly under steps (b) and (c) apply here.

5.

*Liberal Time for Application
on Certain Conditions.*

This rule of liberality is only applicable where steps (a), (b) and (c) of division 3 of this point II have all been taken with reasonable diligence.

Under the admitted facts of this case, construction work on the Farmers canal ceased because of pecuniary inability of the Farmers Canal Company on and after the fall of 1893; it was not resumed until 1905, and then by defendants in error, whose title through Walker was based on foreclosure of mortgage securing some \$80,000 worth, being all bonds sold by said mortgagor. The admitted facts show that from the fall of 1893 until August, 1905, said canal was not susceptible of conducting water to more than

5,661 acres, requiring 81 second-feet, and actually applied to irrigate only 2,000 acres, needing less than 29 second-feet. By what depth of reasoning the court deduced the idea that the owner of said canal for said eleven and a half years was able, ready and willing to conduct water for more than 5,661 acres, we confess our inability to fathom. Its opinion seems to infer such readiness all that time to supply water to 80,000 acres, in face of the stipulated facts. True, it does not say so in as many words. It could not.

Before the opinion under review here was handed down, the books can be searched in vain to find any case holding that the liberal rule in favor of a ditch owner ready, able and willing to conduct water to land owners who could, but did not, buy, was extended beyond the statutory time of prescription. There is not a syllable of evidence to show that the 78,000 acres to which the canal was incapable of conducting water until shortly before the beginning of this suit was occupied. Being arid and without any canal to conduct water thereto, during the 11.5 years mentioned, it is hard to understand how anyone would live on it, unless possibly for the raising of live stock. Its chief products were doubtless sage brush, cactus and jack rabbits. The cases cited by the supreme court of Nebraska on this subject (*ante* 71) sustain the foregoing statement, but not the inferences erroneously drawn by the court.

III.

Said Rules Applied to the Appropriation of Defendants in Error.

Point III is sufficiently discussed in subparagraphs 1 to 5 thereof, as appears *supra* (135-7).

IV.

Premature in 1895-6 to Fix Amounts.

What is said under this point *supra* (137-8), may be sufficient. In 1895 and 1896, the canals of all the plain-

tiffs in error were of such recent construction that, under rules of substantive law, to define the quantity of water each should apply to beneficial use, required more time. Long before the enlargement and extension of the Farmers canal 90,000 acres, or thereabouts, of land hitherto arid had been made fertile by their several canals. The importance of more time being needed to measure the amounts of the several appropriations explains as we proceed why the state board in the two years next following the passage of the act of 1895, adopted rules for a "first hearing" preliminary to a "first determination," intended only to fix time for the doctrine of relation to apply before a "final determination" should be had. This is a subject which the supreme court of Nebraska wholly failed to consider.

V.

Intention of Secretary and State Board.

Our contention on this subject is stated *supra* (138).

To present the matter with more fullness we here subject the opinions concerning the Farmers canal, to a fuller analysis.

The opinion of the secretary rendered January 7, 1897, relative to said canal (41, P. R. 261 to 266), and the "statement of claim" on behalf of the Farmers Canal Company, verified September 15, 1896, (38-40, P. R., between pages 260-261) should be read. In said statement of claim it is said under oath (using different words) that there had been expended on said canal only \$98,000 on an estimated cost of \$350,000. Bear in mind that before the canal was capable of delivering water to the 80,000 acres of land contemplated, nearly \$1,700,000 was expended between 1905 and 1911 (52, P. R. 297). In the 13th paragraph of said document it was further stated,

"That the time estimated as necessary to provide for the application of the amount of water herein claimed to the beneficial use above stated is five years from April 4, 1895."

The statement leaves blank and unanswered the called-for information as to how much water had then actually been used or what crops irrigated (40). When that statement of claim, which the supreme court of Nebraska in its opinion treats as all the evidence required was filed, nine years had passed since the Farmers Canal Company posted its first notice of intention to build a ditch of unstated grade and of much less than half the size to which it was enlarged after July, 1905. Yet the court treats that first posted notice of intention as a pleading to justify what it dubs a "conclusive adjudication" to said canal of all the water said enlargement can furnish.

As to all the canals considered by the secretary's opinion in the early part of the year 1897, time for completion of application to use was conceded (42-3, P. R. 266-280). Said opinions show that with the exception of the permits to the owners of the Gering and Steamboat canals, which were not begun before March 4, 1895 (31, P. R. 235-240), no plaintiff in error was conceded more time than September 1 1902, in which to complete application (42), yet the opinion conceded a more liberal time to the Farmers canal (though earlier begun), viz., to September 1, 1904.

Said opinion *in re* Farmers canal is noticeable for what it does *not* decide. The allowance of "the claim" was conditional. The conditions stated that water "shall be used" (not that it had been used) "for irrigation." The time granted for completing the application was extended to September 1, 1904. The amount of the appropriation was not stated to be 1,142.86 second-feet, but "was not to exceed" that quantity, nor the capacity of the canal at said future time; it "shall be limited" to one second-foot for seventy acres "for each acre to which water has been and shall be actually and beneficially applied on or before September 1, 1904." The context shows, "has been," means "shall have been."

We now further analyze said opinion for the purpose only of seeking to ascertain its author's meaning. We observe he nowhere stated how much water the ditch had carried or then could carry, or how much water was claimed.

It elsewhere appears that the second notice of claim posted on November 17, 1890 (of later date than the initiation of the appropriations of the Minatare, Winters Creek and Enterprise canals) was for 200,000 statute inches, or 4,000 second-feet (28, P. R. 215). "The claim"—whatever it was—was not unconditionally allowed. It is manifest neither the secretary nor the board intended to adjudicate that the "statement of claim," "pleading" and evidence (constituting the entire record before it) showed that the ditch *had been completed* of adequate size, or *had diverted* or used water to irrigate the acreage suggested. Had such been the case, no conditions would have been imposed.

The second condition stated in said secretary's opinion had no possible object other than to manifest its author's intent to grant until September 1, 1904, to perfect an appropriation, which in 1897 was only initiated.

The third condition in said secretary's opinion has, if possible, even greater weight to enable the reader to reach the real intent of its author. In what precedes there is nothing in the opinion about the then capacity of the canal, the amount of diversion thereinto or the extent of use of water thereunder; it is silent concerning amount then appropriated, if any. It is only in this condition that any quantity is even mentioned. If this condition be stricken there is nothing in the opinion on that subject. The condition pertains to the future; even on that topic it is indefinite and negative; it states what the appropriation *shall not exceed*, but leaves to events of the future to settle what it *shall reach*. The amount is *to be limited*, (a) to unknown quantity within a maximum limit; (b) to unstated capacity of the canal *as to be constructed*; (c) to what the future shall disclose as necessary for crops later to be irrigated; (d) to a quantity of water of a certain duty *to be actually applied on or before September 1, 1904*.

The quantity actually appropriated in 1897 is not stated in the opinion. Its reader is referred to four criteria to ascertain later, what *the appropriation "shall not exceed"*

While the then capacity of the canal is not disclosed in the opinion, the present record by stipulated facts shows that in 1897 its capacity was sufficient to irrigate 30,000 acres (about 429 second-feet) (29, P. R. 216); the area then irrigated was only 500 acres, as disclosed by the evidence before said secretary (14-15, 37, P. R. 255-259).

The real intent of the secretary in preparing, and of the board in affirming, said opinion plainly was to aid the Farmers Canal Company by conceding to it 4 years and 5 months more time to apply water to beneficial use than was stated to be necessary for that end in the 13th paragraph of its own statement of claim. The purpose was to give it until September, 1904, before the amount of the appropriation should be definitely fixed. We learn from the present record that on September 4, 1904, only 2,000 acres had been irrigated under said canal, requiring less than 29 second-feet (29, P. R. 216). The author of the opinion evidently intended that said early priority should be measured by and should not exceed a quantity based on such subsequent use. To give effect to such intention the secretary went to the very limit—and beyond it—of what the rule of reasonable diligence permits.

Though the Farmers canal was of earlier inception than any other referred to in this record, a longer time for user was conceded to it by the secretary and board than to any other canal initiated before April 4, 1895, or even to the Steamboat and Gering canals, initiated by permits in 1895.

The trial court reaching a conclusion on a complete record, adjudicates to defendants in error just what the criteria stated in the opinion of Secretary Akers required under the facts disclosed to the court. Said district court decree makes definite what in the opinion was left indefinite and undetermined, save by prescribing rules for subsequent ascertainment.

This analysis shatters the contention of defendants in error that said opinion and its affirmance by said board intended to or in fact did award to the Farmers canal a then definite quantity of water—and especially that 1,142 second-

feet was by that opinion adjudicated as then actually appropriated.

The silence of said opinion—when affirmed, termed by the supreme court of Nebraska an “adjudication”—concerning the quantity actually diverted up to 1897, or the capacity of the ditch as then constructed, makes it wholly vague and indefinite. It therefore determined nothing about the amount of the appropriation. The opinion did not declare that even one second-foot had then been appropriated for irrigation by means of the Farmers canal, though it may be inferred therefrom that some water had then been used. The opinion and its affirmance therefore did not decide and did not purport to decide, or from any viewpoint make *rem judicatam* that any definite quantity had been appropriated.

“If upon the face of the record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered as evidence.”

Russell vs. Place, 94 U. S. 606.

We call particular attention to the last paragraph of the opinion in said case, prepared by Mr. Justice Field, in which, in addition to what is above excerpted, he says:

“According to Coke, an estoppel must ‘be certain to every intent.’ ”

To ascertain the intent of a judicial decree, the whole record before the tribunal can justly be considered.

“The elementary rule is that for the purpose of ascertaining the subject matter of a controversy and the fixing the scope of the thing adjudged, the entire record, *including the testimony offered in the suit*, may be examined.”

Russell vs. Place, 94 U. S. 606, 609, 610;
Cromwell vs. Sac County, 94 U. S. 351, 355, 356;
Lewis vs. Ocean Nav. & P. Co., 125 N. Y. 341, 348.

This court, by Mr. Justice White, where *res judicata* was claimed, *held*, it was proper to introduce the entire record in the original case, including certain testimony to interpret a prior judgment.

Washington Gaslight Co. vs. Dist. of Columbia,
161 U. S. 316, 329.

"It must clearly appear from the record in a former cause, or by proof by competent evidence consistent therewith, that the matter as to which the rule of *res judicata* is invoked as a bar was, in fact, necessarily adjudicated in the former action. If there be any uncertainty on this head in the record, the whole subject matter of the action will be at large and open to new contentions, unless such uncertainty is removed by extrinsic evidence showing the precise point involved and determined."

Kleinschmidt vs. Binzel, 14 Mont. 31.

Section 16 of the Nebraska irrigation act of 1895 (114) requires the state board

"to make proper arrangements for beginning the determination of priorities of right to use of public waters of the state."

It also provides:

"The method of determining the priority and amount of appropriation shall be determined by said state board."

Under said authority the state board, August 20, 1895, adopted a certain resolution establishing rules (32, P. R. 251), *inter alia*, the following:

"The record in the case of each claim shall consist of, 1st, the original notice filed with the county clerk; 2nd, a claim affidavit, signed and verified; 3rd, additional testimony offered at hearing in support of claim."

(33, P. R. 251-2.)

Pursuant to said statute and rule, the claim affidavit and testimony offered at the hearing are a part of the record of said state board *in re* the "claim" for the Farm-

ers canal. Said record must be considered with the opinion to ascertain what was thereby intended to be decided or "adjudicated." An inspection of the opinion of the Nebraska supreme court in *Farmers Canal Co. vs. Frank*, 72 Neb. 136, shows that *said record* was not then before the court. In that opinion certain matters were assumed to have been in the board's record, contrary to the stipulation in the present case.

The "statement of claim" directly referred to in the secretary's opinion (a copy of which statement was not in the supreme court record in said Frank case), leaves it beyond any doubt that neither the secretary nor board intended to adjudicate a perfected appropriation, or that the ditch was even one-fifth completed.

Said statement of claim before the secretary when he wrote his opinion, by leaving blank many essential features, failed to show any application of water whatever. It showed on its face and by its accompanying plat, that while a ditch 81 miles long was contemplated, it was only one-half completed for 19 miles, the remaining part only being excavated partially in unconnected intervals for a few miles further. Also that out of the then estimated excavation of 3,125,000 cubic yards, but 600,000 had been removed; it stated the owner of the canal needed five years from April 4, 1895, to make application of water (39-40).

Other matters in the record before said secretary are the testimony of three witnesses, Ford, McCoskey and Wright (14-15, 37, P. R. 124-6, 256-259). It is hoped the court will read the summary of said evidence (14-15), or the evidence in full (P. R. 256-259).

The entire record before the secretary shows it to be beyond reason that he should have intended to decide that water *had been used* to irrigate more than 500 acres—the then irrigated area as shown by said testimony requiring less than 8 second-feet—or that there was a completed ditch. To assume such an intent is to charge him with lack of ordinary intelligence or wilful wrongdoing.

From the foregoing analysis it is manifest, all the secretary and board intended to decide in 1897 was in a pre-

liminary way, pursuant to section 16 of the act of 1895 (114), to arrange

“for beginning the determination of the priorities of right to use the public waters of the state.”

The only purpose of the board's action indicated by sections 16 and 17 of the same act (114-115), was for the information of such board in considering applications for permits for new diversions, and such controversies as might later arise regarding the distribution of water (115). All the opinions rendered covered only such preliminary matters. At no time did the board enter of record in its office, as called for by section 19 of said act,

“an order determining and establishing the several priorities * * * and the amount of the appropriations of the several persons * * * and the character and kind of use for which such appropriations *shall be found to have been made.*”
(Italics ours.) (115.)

Whether in the course taken the board acted strictly within the statutory authority or not; whether it confused the intended statutory system concerning permits for appropriations later to be initiated with “beginning the determination of the priorities of right” which had their inception before April, 1895, is immaterial to the present topic. Its intention was manifestly as above stated. The record and opinion considered either singly or together eliminate any other conclusion.

VI.

Due Process of Law.

1.

The Equivalent of “Law of the Land” in Magna Charta.

This court recognizes, it is difficult if not impossible to frame a definition of the term “Due Process of Law” which would be accurate, complete and appropriate under

all circumstances. Some general, though not precise, definitions have been announced, e. g., as the administration of law in its regular course according to those rules and forms which have been established for the protection of private rights, in accord with fundamental principles of justice. It means such an exercise of the powers of government as the settled maxims of the law permit and sanction.

Davidson vs. New Orleans, 96 U. S. 97;

Holden vs. Hardy, 169 U. S. 366, 389-391.

This court, by Mr. Justice Brown, says:

“It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the union may disregard, as that no man shall be condemned in his person or property without due notice and an opportunity of being heard in his defense.”

Holden vs. Hardy, 169 U. S. 366, 389-390.

At page 390 in the same case, quotation is made from Murray's Lessees vs. Hoboken Land Company, 18 How. 272, 276, as follows:

“It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make anything ‘due process of law’ by its mere will.”

It has been stated as a general principle that every one is entitled to the protection of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.

6 Ruling Case Law, p. 435.

While much latitude in change of procedure is permitted, no such change can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law

and protect the citizen in his private right, and guard against the arbitrary action of government. One of the latest expressions of this court approaching definition is that in an opinion prepared by Mr. Justice Pitney:

“Without the guaranty of ‘due process of law’ the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (2 Coke, Inst. 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term ‘due process of law,’ all authorities agree that it inhibits the taking of one man’s property and giving it to another, contrary to settled usages and modes of procedure, and without notice or opportunity for a hearing.”

Ochoa vs. Hernandez y Morales, 230 U. S. 139.

2.

Fundamentals of Justice Must be Present.

What has been stated under the previous subdivision and cases there cited are sufficient here.

3.

*Full Opportunity for Hearing, Notice of
Matter to be Heard.*

This court, by Mr. Justice Field, referring to the due process clause, says that it

“is intended as additional security against arbitrary deprivation of life and liberty and the arbitrary spoliation of property. * * * It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be

heard respecting the justice of the judgment sought."

Hagar vs. Reclamation District, 111 U. S. 701, 707-8.

The gist of several decisions on this subject of the right of hearing is thus stated:

"To assert that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

6 Ruling Case Law, p. 451.

To support said text is cited:

McVeigh vs. U. S., 11 Wall. 259;

Windsor vs. McVeigh, 93 U. S. 274;

Hovey vs. Elliott, 167 U. S. 409.

"When the right to a hearing is denied, the mere giving of a notice is ineffectual for any purpose within the meaning of the constitutional guaranty."

Windsor vs. McVeigh, 93 U. S. 274.

Due process of law clearly implies the right of the person affected to be present before the tribunal which pronounces judgment concerning his life, liberty or property, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved.

6 Ruling Case Law, p. 453, sec. 449, and cases there cited.

4.

Necessity of Judicial Decision of Judicial Question.

A state supreme court construed a statute as having conferred upon a railroad commission authority to deter-

mine reasonable rates; and it decided that the determination of said commission was final and conclusive; the statute did not clothe said commission with full judicial functions or with the machinery of a court of justice. This court held, that said statute so construed

“conflicts with the Constitution of the United States. * * * It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy.”

Chicago, M. & St. P. R. Co. vs. Minnesota, 134 U. S. 418, 456-7.

The same doctrine has been applied against a city council on its establishing rates of a public service water company.

San Diego Water Co. vs. San Diego, 118 Cal. 556 (62 Am. St. 261).

It was there held that the court is not limited to the evidence produced before the common council, or other body fixing the rates. When the action of such a body passes constitutional limits, is a mixed question of law and fact, to be determined by the courts on evidence produced before them.

The two cases last cited—touching rates of public service companies—approach a disputed boundary line between administrative, legislative and judicial power. No embarrassment should arise in applying the doctrine announced to the facts in the case at bar. In fixing rates the police power is exercised to protect the public against monopoly, where there is much legislative discretion. Here, the only purpose of an investigation by the state board was to aid it in its function of distributing the water from the public stream in advance of litigation, and to enable it to ascertain what permits for new priorities it could wisely grant. The board was not empowered to act “under the forms and with the machinery” needed judicially to determine the

truth and to safeguard property rights. The legislature had not invested it with power to compel attendance of witnesses so each party could dispute an adverse claim to defend his own right. The decision of a mere administrative body under a statute affording no such process, cannot be conclusive of his rights to property. The constitution protects the owner of property against arbitrary caprice of superior power. Otherwise, an administrative body would become a despot.

In re Lambert, 134 Cal. 626 (86 Am. St. 296, 301, 302, 304).

To constitute due process it is not enough that one "may by chance have notice, or that he may as a matter of favor have a hearing. The law must require notice to him and give him the right to a hearing and opportunity to be heard. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may by its authority be done."

Stuart vs. Palmer, 74 N. Y. 188 (30 Am. Rep. 291);

Bennett vs. Davis, 90 Me. 105;

Underwood vs. The People, 32 Mich. 1 (20 Am. Rep. 633).

In the case at bar we complain not only of what might be done under the statute as construed by the supreme court of Nebraska, but of what in fact was done.

5.

*Vested Property Right Cannot Be Taken
Without Compensation.*

While the phrase used in this sub-head is protected against congress by another amendment specially aimed at the eminent domain power, the due process clause is held to prohibit the deprivation of a person's property without compensation on any guise of state governmental power.

Bradley vs. Lightcap, 195 U. S. 1.

6.

*Equal Protection Forbids Arbitrary
Discriminations.*

Equal protection is denied by a statute, or course taken under it, which subjects the individual to the arbitrary exercise of the powers of government. The law, to be effective, must operate equally upon all who come within the class.

6 Ruling Case Law, 372, and cases there cited.

VII.

*Intention of Secretary and Board Changed
by Excision.*

Having shown, we trust to demonstration, that neither secretary nor state board intended in 1897 to adjudicate that an appropriation of a definite amount had been effected by means of the Farmers canal, it is a travesty on justice for the supreme court of Nebraska by any process of reasoning to so construe said opinion and its affirmance as to change—in fact to reverse—the intent of its author, and then to declare that by said opinion, as so altered, plaintiffs in error are conclusively estopped of record to deny that their rights must be subordinated to an earlier appropriation thus created.

Assume, for purposes of argument in accordance with the supreme court of Nebraska, that the secretary and board had no jurisdiction to render conditional adjudications. It logically results that then the whole opinion must fall. When the intention of an adjudication, as shown by its own words, is void, nothing is left. We insist, this remarkable interpretation of the so-called “adjudication” of the state board, constitutes an arbitrary exercise of the power of the state of Nebraska. The fact that its highest court is the agency, only emphasizes the point that the full power of the state, unless checked by the constitution of the nation, has been exercised to deprive plaintiffs in error of property without due compensation, and hence without due process of law.

VIII.

If Said "Adjudication" was Unconditioned,
It is Void.

In this branch of the discussion we assume for the purpose of argument that the secretary and board did adjudicate and intended to adjudicate what the supreme court has asserted was conclusively determined in 1897. On this assumption we maintain the so-called adjudication is an absolute nullity, because the result of proceedings in which due process of law was not afforded. We now discuss this topic in the order heretofore stated (141-9).

1.

Not in Litigated Case.

In said proceedings there was no plaintiff, no defendant, no tribunal vested with power to compel attendance of witnesses to be cross-examined, etc. A tribunal not named a court *may* in some circumstances be vested with judicial powers, if due process be prescribed.

We merely note in passing, as probably not involving federal questions, the following provisions of the Nebraska constitution, and decisions of the highest court of the state construing the same, viz.:

(a) Article 2, sec. 1, dividing the powers of the government into three distinct departments, and forbidding any persons in one branch from exercising any power properly belonging to another (104).

In re Railroad Commissioners, 15 Neb. 679, 682;
Tyson vs. Washington County, 78 Neb. 211.

(b) Article 6, sec. 1, vesting the judicial power of the state in certain named courts and such others inferior to the district courts as may be created by law for cities and towns (106).

(c) Article 6, sec. 9, granting to the district courts both chancery and common law jurisdiction (106).

(d) Article 6, sec. 19, declaring that all laws relating to courts shall be of general and uniform operation.

The act of 1895 creating the state board of irrigation did not assume to vest that board with compulsory process to compel attendance of witnesses or other usual judicial functions to hear, settle and determine property rights.

In an opinion handed down February 4, 1903, the supreme court of Nebraska held:

“The duties of the state board of irrigation, as provided for in the irrigation act of 1895, are administrative, and not judicial. * * *

“Where a large number of persons claim rights to use or divert the waters of a stream by virtue of riparian waters, appropriations, prescription, or otherwise, a suit in equity to determine such rights, and enjoin an infringement, under color thereof, of rights acquired under the irrigation act, may be maintained to avoid a multiplicity of suits.”

Crawford Co. vs. Hall, 67 Neb. 325;
S. C., 60 L. R. A. 889, 890.

Said excerpts are taken from paragraphs 24 and 25 of the syllabus, as reported in 60 L. R. A. In the opinion the court says:

“The primary object of the board is for the purpose of supervising the appropriation, distribution and diversion of water. This is obviously an administrative, rather than a judicial, function.”

Crawford vs. Hall, 60 L. R. A. 889, 906.

After quoting with approval from White vs. Farmers High-line Canal & Reservoir Co., 22 Colo. 191, relating to the expediency of regulating distribution from the public streams, the court proceeds:

“In order to accomplish this object it is necessary and expedient to provide for *certain preliminary investigations.*” (Italics ours.)

Crawford Co. vs. Hall, 60 L. R. A. 889, 907.

On the same page the court quotes from *Farm Inv. Co. vs. Carpenter*, 9 Wyo. 110, where, referring to the powers of the Wyoming board of control, this language is used:

“The board is not required to await the occurrence of controversies, but it is to proceed on its own motion to ascertain the various rights, conflicting or not, and thereupon see that the water is properly divided.”

The Nebraska court then says:

“Such functions, it would seem, are clearly administrative in character, and not judicial. It is a judicial function to administer justice between litigants in cases where disputes arise, and to settle these disputes according to law as administered in courts of justice.”

Had the court in the case at bar followed said correct announcement, this case would not be here. But now, it holds, this administrative board (authorized by statute to do certain things on its own motion for administrative purposes) can *legislate* its own procedure, exercise the *judicial function* of its own initiative in advance of dispute or controversy, by adjudicating conclusively property rights of vast magnitude, and then can administer and *execute* its own decrees, without control by the courts.

Apropos of the distinction between administrative function and the exercise of judicial power, it is pertinent to quote from Blackstone:

“A court is defined to be a place where justice is judicially administered. * * * In every court there must be at least three constituent parts; the *actor*, *reus* and *judex*; the *actor*, or plaintiff, who complains of an injury done; the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to be done, to ascertain, and by its officers to apply the remedy.”

3 Blackstone's Com., 24-5.

Another author says:

“No one can properly resort to a court of justice until his right is disputed, so there must be a complainant and someone to complain against.”

1 Wait's Pr., 32.

Under the principles stated in the foregoing excerpts the state of Nebraska cannot under the United States constitution clothe an administrative board with such arbitrary powers, with lack of judicial process or machinery. Not until August, 1909, when under the admitted facts the rights of the plaintiffs in error were interfered with, was it incumbent on them to seek to redress in a court of chancery. This suit then had its inception. The district court granted the relief sought. The supreme court of Nebraska, by manufacturing a *rem adjudicatam*, deprived them of it.

2.

*No Hearing or Notice Thereof Prescribed
by Legislature.*

The statute (act of 1895) (112-125) contains no provision either for hearing or for notice of a hearing to parties whose interests may be affected by an “adjudication” of the board. Its 16th section (114) makes it the duty of the state board at its first meeting

“to make proper arrangements for beginning the determination of the priorities of rights,” etc.,

said determination to begin on the streams most used for irrigation, and to be continued rapidly until all the “claims for appropriation shall be adjudicated.”

“The method of determining the priority and amount of appropriation shall be determined by the said state board which, at its first meeting, shall designate the streams to be first adjudicated.”

The act contains nothing from which even an inference can be drawn that said state board would hear parties whose

interests would be affected. Our position as to what the real intent of the act and of the board's action thereunder is in line with what has been stated *supra* under Points IV and V (137-138), i. e., to make merely preliminary investigations to aid in its administrative function of distribution, by determining *prima facie* the dates of the several claims. Such seems once to have been the view of the statute taken by the supreme court of Nebraska, as indicated by the following two excerpts from its opinion in Crawford Company vs. Hall, 67 Neb. 323 (60 L. R. A. 906-7) :

"The primary object of the board is for the purpose of supervising the appropriation, distribution, and diversion of water. This is obviously an administrative, rather than a judicial function." * * *

"In order to accomplish this object, it is necessary and expedient to provide for certain preliminary investigations."

If the "adjudication" provided for by the statute was to result from "preliminary investigations," and not to an adjudication conclusive as between rival claimants, there was no necessity for hearings or notices to the various appropriators. This construction of the statute would not render it obnoxious to the 14th amendment to the federal constitution, because no one would thereby be deprived of his property.

The failure of the statute to provide for either hearings or notice at any stage of the board's proceedings is of very special significance, because some sections of the act of 1895 were borrowed bodily from the irrigation law of Wyoming. The draughtsman of the Nebraska act of 1895 seems to have taken special pains not to copy either in form or substance the numerous provisions of the Wyoming act calling for notice, not only initially, but in numerous stages of the proceedings.

This matter is of such significance that we give it special attention here.

The provisions on the subject of notice emanating from the Wyoming state board of control (which board has ad-

ministrative functions like those of the state board of irrigation in Nebraska), appear in the following sections of the Compiled Statutes of Wyoming, 1910 (Italics ours):

SEC. 765. The said board *shall prepare a notice*, setting forth the date when the engineer will begin a measurement of the stream, and the ditches diverting the water therefrom, and a place and a day certain, when the superintendent * * * shall begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published * * * in the county in which such stream is situated, * * * at least 30 days prior to the beginning of taking testimony by said division superintendent, or for the measurement of the stream by the state engineer, or his assistant; and the superintendent taking such testimony shall have *power to adjourn* the taking of evidence from time to time, and from place to place." * * *

Section 768 provides for the sending of a blank form of claim to the several appropriators, who are to fill out the same. It is to be observed that this statement in Wyoming provided by the legislature, does not call for information about time desired to complete an appropriation by construction, or by enlargement.

Section 770 provides that on the date noticed as set forth in the preceding sections, the division superintendent shall begin and thereafter continue the taking of testimony until completed.

SEC. 771. Upon the completion of the taking of evidence by the division superintendent, it shall be his duty *to at once give notice* in one issue of some newspaper, * * * and by registered mail to the various claimants, that upon a certain day, and a place named in the notice, all of said evidence shall be open to the inspection of the various claimants, and said superintendent shall keep said evidence open to inspection at said place, not less than one day and not more than five days.

SEC. 772. Should any person * * * desire to contest any of the rights of the persons * * * who have submitted their evidence * * *, such persons * * * shall, within fifteen days after the testimony so taken shall have been open to public inspection, in writing, notify the superintendent of the water division, * * * stating with reasonable certainty the grounds of their proposed contest, * * * and the said division superintendent *shall notify* the said contestant and the person * * * whose rights are contested, to appear before him at such convenient place as the superintendent shall designate in said notice.

SEC. 773. Said superintendent shall also fix the time both as to day and hour, for the hearing of said contest, which date shall not be less than 30 nor more than 60 days from the date the *notice is served* on the party. * * * Superintendents of water divisions shall have *power to adjourn hearings* from time to time *upon reasonable notice* to all the parties interested, and *to issue subpoenas and compel the attendance of witnesses* to testify upon such hearings. * * * The evidence on such proceedings shall be confined to the subjects enumerated in the *notice of contest*.

Section 775 provides that on completion of the evidence in the original hearing and in all the contests before the superintendent, it shall be his duty to transmit all such evidence to the board of control.

SEC. 776. It shall be the duty of the state engineer * * * to proceed at the time specified in the *notice to the parties* on said stream to be adjudicated, to make an examination of said stream and the works diverting water therefrom, said examination to include the measurement of the discharge of said stream, of the carrying capacity of the various ditches and canals diverting water therefrom; an examination of the irrigated

lands, and an approximate measurement of the lands irrigated, or susceptible of irrigation from the various ditches and canals, which said observation and measurements shall be reduced to writing and made a matter of record in his office. * * *

SEC. 777. At the first regular meeting of the board of control after the completion of such measurement by the state engineer, and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from said stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made, the amount of water which shall have been applied for beneficial purposes. * * *

All said provisions which we have italicized show that in Wyoming the legislature took special care to provide for notices of the following matters: (a) of the beginning of taking testimony; (b) of the day and place when evidence taken would be open to inspection of interested parties; (c) to both contestant and contestee of some designated place and time when a contest would be heard, and (d) of definite times of adjournment. It took like care also to provide powers for the official taking the testimony, (a) to adjourn from time to time on notice to interested parties, (b) to issue subpoenas, and (c) to compel attendance of witnesses. In Nebraska the statute contains no such provisions.

Notwithstanding all the care taken in Wyoming for all these notices and powers of the board of control, the highest court of that state has held that the decisions of said board are not conclusive on the courts.

Farm Inv. Co. vs. Carpenter, 9 Wyo. 110 (50 L. R. A. 47);

Ryan vs. Tutty, 13 Wyo. 122.

The supreme court of Nebraska is well aware of that fact, because in Crawford Co. vs. Hall, after calling attention that in Wyoming the constitution authorizes the creation of such board, while that of Nebraska is silent on the subject, the court says (2d col., p. 906, 60 L. R. A.):

“The duties of the board there, as here, are supervisory and administrative in character, and not judicial.”

When we consider that many sections of the Nebraska act of 1895 are copied bodily from Wyoming, and that other sections, elsewhere similar, omit said requirements of hearings, notices, compulsory process, and the like, the inference is strong that these omissions were intentional, to the end that the administrative board created should obey the mandate of the Nebraska constitution and not exercise judicial functions or powers, but be limited to administrative investigations.

The only word militating against this view is the word “adjudication.” The draughtsman of the statute, in adopting the Wyoming law, neglected to substitute the word “investigation.” But as we have shown, the supreme court of Nebraska, before changing its mind in the Frank case and the instant one, put the true construction thereon.

The Wyoming law, with some modifications, was enacted by the legislature of Oregon. The latter state retained the provisions for hearings, notice, process, etc., in its administrative board, but made a noteworthy change in requiring the filing in the circuit court of the evidence and findings of its board of control. Then that court, after due notice to afford opportunity for all parties to be heard with additional evidence, argument, etc., renders a final decree, subject to appeal to the supreme court of the state. In effect, in Oregon the state board of control acts as a *quasi*-referee for the circuit court in advance of the cause being there docketed. The case of Pacific Live Stock Company vs.

Lewis et al. (No. 300, October Term, 1915), brings to the court's attention the chief hardship incident to the Oregon statute, in that it makes the finding or ascertainment of conflicting rights by the state board (which may be based chiefly, if not wholly, on *ex parte* investigation and hearsay) *prima facie* valid and enforceable with penalties, until changed, by the circuit court's decision.

In Colorado, jurisdiction to adjudicate priorities is exclusively in the courts, from first step to the last; ample notice is given to all parties concerned during all stages of the proceedings. See sections 3286 to 3289, 3307 to 3312 and 3318, Revised Statutes of Colorado of 1908.

The Colorado system is followed in the state of Washington. See sections 4159, 4161-3, Ballinger's Annotated Code and Statutes of Washington, 1889.

Not only does the Nebraska statute fail to contain any similar provisions for hearings and notices during all stages of the proceedings; it contains no provision at all empowering the state board of irrigation to grant a hearing to anyone, to adjourn such hearing when granted to a time certain, to issue subpoenas, to compel attendance of witnesses, or even to administer an oath.

It is manifest, therefore, with the construction placed upon the proceedings of the Nebraska state board and the results flowing from its "adjudication," the statute is void in failing to provide hearings of or notice to interested parties; as construed by the highest court of the state, it deprives interested parties of valuable property rights without due process of law.

To provide for hearings, with notice to interested parties, for compulsory process and the like, pertains to the legislative branch of government, not to the judicial or executive. The failure of the legislature to make such provisions cannot be supplied by giving notice as a matter of favor, even if one be given.

In our view, this precise question has been determined by this court.

- Coe vs. Armour Fertilizer Works, 237 U. S. 413,
59 Law ed. p. 1032;
Central Georgia R. R. Co. vs. Wright, 207 U. S.
127, 138;
Hawley vs. Hawley, 176 U. S. 398, 409;
Louisville & N. R. Co. vs. Central Stock Yards Co.,
212 U. S. 132, 144.
Windsor vs. McVeigh, 93 U. S. 274, 279;
Chicago, M. & St. P. Co. vs. Minnesota, 134 U. S.
418, 456-7.

In the first case last just cited, the court, by Mr. Justice Pitney, at page 1032, 59 Law ed., says:

“Nor can extra-official or casual notice of a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires.

“In *Stewart vs. Palmer*, 74 N. Y. 183, 188, 30 Am. Rep. 289, which involved the validity of a statute providing for assessing the expense of a local improvement upon the lands benefited, but without notice to the owner, the court said:

“‘It was not enough that the owners may by chance have notice or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard.’

“‘The soundness of this doctrine has repeatedly been recognized by this court. Thus in *Security Trust & S. B. Co. vs. Lexington*, 203 U. S. 323, 333, the court, by Mr. Justice Peckham, said, with respect to an assessment for back taxes: ‘If the statute did not provide for a notice in any form, it is not material that as a matter of grace or favor notice may have been given of the proposed assessment. It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case that is material, but the question is, whether any notice is provided for by the statute.’”

It is worthy of note that the supreme court of Nebraska prior to its decision in *Farmers Canal Co. vs. Frank*, 72 Neb. 136, adopted the same view, for it said:

“Any act of the legislature authorizing an appropriation or damaging property for public use in any manner, or by any person or persons, must further provide for compensating the owner of the property, and if a hearing is to be had, or proceedings in the nature of a judicial determination of the damages, then *for a notice of such hearing*, and its time and place; and if no notice is given, if provided for in the act of the legislature, this will not and cannot deprive the citizen of his right to damages, guaranteed to him by the constitution, but he will have a right of action at law for any damages he may have sustained in a proper court.”

After quoting the statute under consideration in that case, which made no provision for notice, the court states:

“Here are conferred the power and authority to one party to appoint or form the amount of recovery, without any notice to other parties concerned, or any provision for them being in any manner represented in the proceedings, and providing for an appeal from an adjudication of their rights about which they can have no knowledge, and making the remedy by appeal exclusive. Can this be done? We are satisfied that it is within the inhibition of the provisions of the constitution as an attempt to appropriate or damage property without due process of law, and will not bar parties from the right to an action for the damages sustained; and the fact that the legislature has failed to provide for any notice cannot bar the right of compensation.”

And again:

“The law giving the city the right to establish and change grades *must provide for notice*, and such notice must be given as prescribed, in order to bind parties whose property is damaged by change of grades.”

McGavock vs. Omaha, 40 Neb. 64 (58 N. W. 543, 547).

The act of 1895 under consideration (112-125) does not authorize a proceeding to affect the property rights of any person. If the construction placed upon the statute by the supreme court of Nebraska in *Crawford Company vs. Hall*, *supra*, had been adhered to—and its then views are manifestly correct ones—what said court then termed “preliminary investigations” did not and could not affect property rights of the present plaintiffs in error. The later construction in *Farmers Canal Co. vs. Frank*, 72 Neb. 136, and in this cause finally construes the statute as authorizing proceedings which conclusively affect property rights. *With* said construction the statute is manifestly void, as coming within the inhibitions of the 14th amendment to the Federal constitution.

The cases cited to support its holding in the present case on this point do not support the rule announced in the opinion under review. The Nebraska court seems to imply in its opinion that the *right to be heard* was prescribed by the statute. It cites some cases to the point that where “the right to be heard” is prescribed by the legislature, it is implied that notice shall be given. Those cases do not imply that the right to be heard as well as notice can ever depend upon mere administrative favor.

In *Paulsen vs. City of Portland*, 149 U. S. 30, referred to by the Nebraska supreme court in its opinion herein, the validity of a section of the charter of a city and of an ordinance passed pursuant to that charter was attacked. It appears that the ordinance provided:

“All persons interested may appear before said viewers *and be heard* in the matter of making said estimate.”

It further required stated meetings to be held, and report to be made within sixty days. Notice was actually given. While the validity of the ordinance was questioned, because it did not expressly provide for notice, it did provide that the cost of the sewers in question should be assessed to the several property owners “in accordance with the provisions of section 121 of the charter.” That charter section, as con-

strued by the court, did require notice. With this construction of the charter, this court held:

“And where a statute or ordinance provides for stated meetings of a board, designates the place at which the meetings are to be held, and directs that all persons interested in the matter may be heard before it, it is, as said by Strachn, not a strained interpretation that it is implied, thereby, that some suitable notice shall be given to the parties interested.”

The distinction between the Paulsen case and that at bar is apparent. The Nebraska statute nowhere provides that interested parties shall have a hearing or right to be heard, and does not designate the times in which the board shall make a determination. It varies in these basic matters from the statutes, charters or ordinances mentioned in the cases cited by the court to sustain its opinion under review.

Kentucky R. R. Cases, 115 U. S. 321, cited by the court below, are also not pertinent. They pertain to matters preliminary to assessment and collection of taxes. This court there held:

“Notice by statute is generally the only notice given, and that has been held sufficient.”

The pith of that decision is, that where a tax matter is under consideration all taxpayers are supposed to know by statute the day they must, as a rule, make complaints on the subject of assessments, and it is their own fault if they do not at that time complain. It certainly is inapplicable to this case, where a secretary of a state board gives notice to parties to put in *ex parte* evidence, then holds the matter under advisement for months without formal adjournment. The statute provides for no stated time or place when the board itself will act.

It is not easy to comprehend the force or effect of the ruling by the court below in its reference to “police power of the state.” While it is true that a legislature under the police power may provide for boards to regulate the rates

of railroad, gas, telephone, telegraph, electric light and water companies serving the general public, or of irrigation companies, to require them to distribute water according to the rights acquired by respective consumers, or according to relative rights of the companies themselves, such regulative acts are merely administrative. They do not oust the jurisdiction of the regular courts of justices in cases where the so-called "regulation" amounts to deprivation of property, or its reasonable incidents. In such cases the courts of chancery restrain such acts of such boards. The cases above cited by us are ample to sustain this statement.

It cannot be seriously contended that a conflict between two railroad corporations for the title to a portion of the right of way of either of them or the disputed ownership of certain equipment, could be settled by an administrative board created under the police power of the state. Such a controversy would be a judicial one, and therefore would have to be settled on suitable judicial procedure. The necessity for the filing of a proper pleading, the serving of proper process, or the due and orderly procedure in such a case, could not be dispensed with on the theory that such corporations were subject to regulation under the police power of the state.

If it is intended by said reference to the police power, to intimate that property rights acquired by individuals or corporations to the use of water of the streams of the state, depend solely on the legislative will and without the observance of any constitutional limitation, then we join issue with the Nebraska supreme court on that proposition.

The rights acquired by the parties prior to the passage of the act of 1895 being very valuable, and the claims made by some of them infringing upon those of others, it required nothing short of a judicial proceeding to settle their rights. This required such notice and hearing as are essential to the validity of the proceedings and the judgments of judicial tribunals.

3.

*Notice of Adjudication Prescribed by Legislature
Not Given.*

While the irrigation act of 1895 (112-125) did not provide for any hearings or notice thereof—a matter we have just discussed—it did contain one provision, the purpose of which was evidently to provide for such notice of a “final determination” of the state board, as would afford to any party feeling aggrieved opportunity to appeal therefrom to the district court within sixty days.

In our view, this opportunity to appeal to the court was really intended by the legislature as an incident to an administrative proceeding to guard an interested party against the hardship and inconvenience of an unfair distribution of water by the water officials, pending ordinary litigation.

This short time for appeal, of course, becomes of greater importance when the order of the board affirming the secretary's opinion *in re* the claim of The Farmers Canal Company is construed—as it now is by the highest court of the state—to be a final and conclusive adjudication of property rights. A remarkable feature of this case is that the only requirement in the statute from which, if observed, plaintiffs in error might have had a statutory appeal, was disregarded by the state board. The probable reason for this was that the board itself did not look upon its affirmance of a few opinions as a “final adjudication” of priorities from the North Platte river. However, the highest court of the state has construed their action otherwise.

The sections of the statute to be considered on this point are sections 21, 22 and 23 (115-117). Paragraphs 83d and 89th of the stipulation of facts (44-45, P. R. 281, 288) show failure to comply with the requirements of section 21; also, that no plaintiff in error had knowledge of the secretary's opinion *in re* the Farmers canal until several years after its adoption or affirmance. Hence, there was no opportunity to appeal therefrom.

The supreme court of Nebraska in its opinion treats section 21 as only directory (p. 78). In another part of the opinion it refers to provisions for appeal (p. 75). It fails to explain how an appeal within sixty days was possible to be taken by an aggrieved party without knowledge of the erroneous "adjudication."

This failure to comply with section 21 of the statute (115-116) deprived plaintiffs in error of due process of law. A full analysis of said sections 21, 22 and 23, evidently intended by the legislature to be construed together, is stated *supra* (143-144).

The cases referred to under subdivision 2 last *supra* are sufficient to present to the court our views of the law on this point. A very lucid expression thereof in a former case was made by the supreme court of Nebraska itself, wherein it says:

"Here are conferred the power and authority to one party to appoint or form the amount of recovery, without any notice to other parties concerned, or any provision for them being in any manner represented in the proceedings, and providing for an appeal from an adjudication of their rights *about which they can have no knowledge*, and making the remedy by appeal exclusive. Can this be done? We are satisfied it is within the inhibition of the provisions of the constitution."
* * * (Italics ours.)

McGavock vs. Omaha, 40 Neb. 64, 58 N. W. 543, 547.

4.

*Rules of Board Did Not Provide for Due
Process of Law.*

This topic we argue in the same order as indicated *supra* (144-146).

4 (a)

Notice Only of a "First Hearing."

Rule 12 adopted by the board (34, P. R. 252) required notice to be mailed to each claimant "ten days beore the date of the first hearing announced." If there was to be no other hearing, the use of the word "first" was both superfluous and misleading. Rule 3 (32-33, P. R. 251) specifies the objects and purposes of the "first adjudication." These purposes are stated to be:

- (1) The validity of claims;
- (2) The land covered in the case of irrigation canals;
- (3) The date when work *must be completed*, in the case of uncompleted canals;
- (4) The time within which the water claimed must be applied to the beneficial use for which it is appropriatd.

Copy of these rules was sent to each claimant with the only notice mailed. Said notice (23, 37, P. R. 255), mailed June 5, 1895, required claimants "to attend at hearings for their respective counties in order to furnish to the officer presiding at said hearings the necessary proofs, if any be required, to sustain their claims; otherwise, said claims will be dismissed."

A person receiving said notice with copy of said rules and responding thereto, was not notified that anything would be "determined" at the time or place of said "first hearing;" in fact, nothing was. The notice did not state there would be opportunity for argument, to subpoena witnesses, to present proof against any adverse claim, or anything of that nature. An interested party was asked only to attend to furnish proof, if any be required, of its "claim"; nothing else was done. No notice was then or later served to give information relative to what the secretary or board did with reference to earlier claims.

Under the authorities cited under Point VIII, subd. 2, *supra* (143), there was no proper notice of a hearing to constitute due process of law. This is too manifest to require further argument. Anyone responding to said notice would

naturally suppose that before any steps would be taken seriously to affect his property rights, there would be more than a "first hearing," and that later, on further notice, he would have opportunity to be heard on the merits not only of his own, but of any claimed superior claims. No "day in court" on the merits was afforded to any plaintiff in error.

4 (b)

Hearing Only for Ex Parte Proof.

We have already noted the contents of the notice. Any party responding thereto must have supposed his attendance was required only to present *ex parte* proofs of his own "claim," inchoate or otherwise, not to offer evidence to rebut claims of rivals or to cross-examine. On this topic it is pertinent to quote from an opinion of the United States circuit court of appeals, as follows:

"Due process of law must give * * * notice of the * * * claim * * * and an opportunity to be heard respecting the justice of the order or judgment sought. The notice must be such that he may be advised from it of the nature of the claim against him and of the relief sought * * * if the claim is sustained."

Michigan Trust Co. vs. Ferry, 175 Fed. 667, 678.

Applying said rule to the instant case, plaintiffs in error were not notified of what was claimed for the Farmers canal as of earlier priority. The allowance of the claim for the Enterprise canal, to illustrate, would amount to little if the Farmers should be given a superior priority for more than the entire river flow at low stages. It is the decision made on the claim of a senior priority which deprives juniors in their order (at different stages of river flow) of their proper status, or priority. When we consider that there was no notice to any plaintiff in error either of secretary's opinion or board's affirmance *in re* claim of the Farmers canal, until several years after the time for statutory appeal had elapsed, the wrong done plaintiffs in error is manifest.

If the opinion under review be not reversed, what protection do plaintiffs in error have under the federal constitution? In this connection we also cite:

In re Rosser, 41 C. C. A. 497;

In re Wood, 210 U. S. 246, 254.

4 (c)

A "First Adjudication," Not a Final One, Was Provided by Said Rules.

On August 20, 1895, said board adopted fourteen rules (32-34, P. R. 251-252). No analysis of said rules appears in the opinion of the supreme court of Nebraska, under review. These rules do not provide for the determination of the amounts of priorities of appropriation from any stream. The apparent purpose and intent of the board was at some later time to make further provisions to that end. The rules adopted and notice sent did provide for a preliminary or first hearing, leading any party to suppose that later a final determination would occur on new notice and opportunity to be heard. Anyone reading the notice and rules would naturally suppose the "first adjudication" mentioned in rule 3, was to afford a basis for supervising the distribution of waters of the state until some final determination might be later made, or ordinary litigation between parties concerned should occur.

Rule 3 specified the objects and purposes of the "first adjudication." The use of these words was misleading, if the intent was to make a final and conclusive adjudication of property rights. Any party receiving the notice with said rule 3, would naturally suppose that a "first adjudication" was to determine (1) the validity of "claims"; (2) the land covered by an irrigation canal; (3) the future date when the work must be completed in case of completed canals; (4) the time when the water claimed must be applied to beneficial use (32-3, P. R. 251).

All these statements in rule 3 are relevant to a mere preliminary or interlocutory matter, but not to a final ad-

judication of perfected appropriations, which could properly take place only when the doctrine of relation could be justly applied to the respective claims.

One object of the board in this "first adjudication" being to determine when the appropriation would be completed, the board thereby led any reader to suppose it was its intention to postpone the final determination until such future date; if not, the rules sent with the notice of "first hearing" were misleading. The rules would naturally lead any interested party reading them to believe that all the board sought at that time was to ascertain what appropriations had been initiated, though not fully ripened, under the act of 1889; and what time should be determined as necessary to cause those appropriations to be definitely measured by application of water to beneficial use, and then, and not until then, that each appropriation would be definitely determined.

The rules may be searched in vain to find a provision to the effect that the board would at the "first adjudication" determine the amounts as well as priorities of the appropriations of water from the streams of the state. The provision for a "first adjudication" in rule 3, considered in connection with the notice for *ex parte* proofs in support of claims, calling for claimants "to attend at hearings for their respective counties," would lead any reader to suppose that he was not expected to be present at a hearing in any other county than his own, or to be permitted to oppose claims of others. There was nothing to put any recipient of the notice on his guard that controversies between different claimants would then be settled and determined.

Cases cited under 4 (b) last *supra* are equally pertinent here.

4 (d)

*The Blank Form of "Claim" Not Adapted to a
Final Adjudication.*

Rule 9 of the board, taken in connection with the form of "claim for the waters of the state of Nebraska," pre-

pared by the board and mailed with the notice and rules, should be carefully read (33, P. R. 251).

Said rule 9 provided in effect that claimants who should file with the secretary ten days before the "first hearing" announced, "claim affidavits" of the prescribed form, "need not appear at said hearing unless they wish to offer additional testimony."

The form of claim affidavit so prepared called for information as to future events which under rules of substantive law must precede the definite amount to be ascertained as effected under each priority. In the case of the Farmers canal, much of the information called for by said affidavit was left blank. It certainly did not constitute proof of a completed appropriation. No rational person at that time could have assumed that on such defective *ex parte* evidence there would be a conclusive determination of a vested appropriation by means of said canal of early date for much more water than flows in the river at low stages. Plaintiffs in error ask the court to read that affidavit or statement of claim (38-40, P. R. 260-261).

Anyone reading rule 9 and said blank form of statement of claim would suppose the board's intention was merely to gather certain *ex parte* information about "claims" on file in its office by transcripts of sundry notices of intention posted years before, to aid the board during its earlier years of policing the stream. Such reader must have been led to conclude that a final and more definite ascertainment would be deferred for years. It is a travesty on justice to hold, such procedure (even though authorized by statute) furnished due process of law to attain the result which the supreme court of Nebraska has reached in its opinion under review. Said court must, for some reason to us unknown, have failed to analyze the rules so adopted by the board. On said analysis of rules, statement of claim and opinion relative to the Farmers canal, it is obvious that the conditions in the opinion conformed strictly with the procedure adopted by the board. To excise the conditions takes away every safeguard intended. To make said opinion with the conditions excised a conclusive adjudica-

tion against plaintiffs in error lacks every element of due process of law.

5.

Board Did Not Follow Its Own Rules.

Rule 11, adopted by the secretary on authority of said board (35, P. R. 253), reads:

“Copies of opinions handed down by the secretary in matters of adjudications and contests shall, upon the same day as the date of said opinions, be mailed to the parties in interest.”

The stipulation of facts shows that the secretary's opinion relative to the Farmers canal, recorded in his office January 7, 1897, was mailed to The Farmers Canal Company, but no copy or notice of said opinion was ever sent or given to any other claimant (41, P. R. 261). The same practice was followed with reference to all the opinions, i. e., each was mailed only to the claimant of the canal in such opinion considered.

This practice shows that said official did not then treat his opinions as incident to a final adjudication; otherwise, he would have mailed the opinions concerning the claim of any early appropriator to all claimants of junior priority, for such persons then would necessarily be “parties in interest.” If the adjudication which was to follow said opinions be such as the highest court of the state has construed it to be, the board did not follow its own rules.

The supreme court of Nebraska in the opinion under review, without analysis, refers to the rules as providing for rehearings before the secretary, contests, appeals from secretary to board, and rehearings before the board in matters of contest. It is true that a cursory glance at the rules prepared by the secretary (34-36, P. R. 253-254) gives apparent color to that conclusion, because those topics are referred to; but the assumption that there was opportunity for such rehearings, contests and appeals falls of its own weight when it appears that the secretary failed to furnish

the only possible opportunity whereby anyone could file a contest or have a rehearing or appeal. The argument made under subdivision 3 of this point (208-209) and the language quoted from McGavock vs. Omaha, 40 Neb. 74, 76-77, is equally pertinent here. The failure of the board to advise any claimant of what was awarded to its senior prevented an appeal to the district court. The failure of the secretary to mail to its junior his opinion concerning a canal of any senior prevented its junior from having any opportunity of contest, a rehearing or an appeal to the board, or a rehearing before the board.

Rule 2 adopted by the secretary under subhead "Rehearing before state board" (36, P. R. 254), reads:

"Decisions of the secretary from which appeals are not taken as herein provided, will be affirmed by the board."

Not only did the procedure authorized by the board and secretary fail to provide due process, but also the neglect of the secretary to observe his own rules emphasizes the want of semblance of any element of due process of law.

That each party received a copy of the opinion concerning its own canal affords no notice of opinions about any other; the hardship arises from that very matter. The opinion received by each claimant contains nothing to indicate a prior appropriation had been allowed to anybody. To illustrate, it was not the opinion on the Enterprise canal that deprives its owner of its property; it was the opinion of the secretary, afterwards affirmed by the board, without knowledge of the Enterprise owner, relative to the claim of the Farmers Canal Company, as later construed by the supreme court of Nebraska to be a conclusive adjudication of property rights. It deprives the Enterprise owner as well as all other plaintiffs in error of their relative status, in fact of all water in low stages, beginning in the late summer of the year 1909.

Section 19 of the act of 1895 (115) made it the duty of the state board,

“when the adjudication of the stream *shall have been completed* * * * to make * * * an order determining and establishing the several priorities,” etc.

The entry of an order on April 7, 1897, affirming all opinions of the secretary rendered before that date, was long prior to a general determination of all the appropriations from the stream. It is unreasonable to treat that affirming order as such an adjudication as the statute contemplated. Presumably, that is the reason why the board failed to comply with the requirements of section 21, about a formal certificate of contents there specified, or to transmit such certificate to any county clerk for record, etc.

6.

Adjournment Without Notice and Without Day.

Rule 5 adopted by the board contains this clause (33, P. R. 251):

“Said hearings shall be held for the purpose of receiving testimony offered by parties in interest, in support of rights claimed.”

Anyone reading the rule would suppose it was not the intention at said hearing to go into controversial matter, or, as we have already shown, to take up at any stage of the “first adjudication” anything more than preliminary matters. The rules provide for no adjournment of the first hearing, nor for any notice of time of adjournment. The stipulation of facts shows that no order continuing any hearing to a subsequent time or place was applied for, made or entered; nor was any announcement made or notice given that any claim would be again considered or heard (38, P. R. 260).

The only purpose of the hearings so far as indicated in the notice thereof, viz.: the taking of evidence of parties in support of their respective claims, had been accom-

plished. It follows upon adjournment *sine die*, jurisdiction to be binding or conclusive upon parties as to property rights was lost as completely as if no notice had ever been given. There might be some plausibility in a contention that interested parties should take notice of further action, if either the statute or the rules of the board designated any particular time or meeting when consideration would be had of the evidence so taken by its secretary. No such provision can be found either in the statute or the rules (though in the Wyoming statute). In fact, the said rules did not provide that such an "adjudication" as the supreme court of Nebraska has held was made in this case, would ever be made. The interested parties were not advised that such an adjudication would be made or attempted, nor were they given any notice thereof. On the adjournment of the hearings there was no possible way for the parties to know when the secretary would give opinions on appropriations of rivals, or the amounts of water to each, unless they remained in constant attendance at the office of the secretary and at meetings of the board.

If a justice of the peace or any tribunal of limited jurisdiction, acquires jurisdiction over a case by the service of summons, and on the return day receives evidence, but enters no judgment and takes no continuance to a definite or specific time, it seems beyond dispute, such justice or tribunal loses jurisdiction.

This court recognizes the rule:

"That jurisdiction once lost can only be regained by some proper notice."

Wetmore vs. Karrick, 205 U. S. 141, 158.

7.

*"Adjudication" Unsupported by Pleading
or Evidence.*

Rule 11 adopted by the board (33, P. R. 251-2) made the record in each case consist of the following matters:

1st. The original posted notice, as also filed with the county clerk.

2nd. A claim affidavit, signed and verified.

3rd. Additional evidence offered at hearings to support the claim.

4th. Points of law and authorities.

5th. Decisions of secretary, reviewable by the board only on exceptions taken at time of hearing and determination.

Rule 9 (33, P. R. 251) provided that a claimant, who files with the secretary ten days before the first hearing a claim affidavit in the form prescribed, "need not appear at said hearing," unless wishing to offer additional evidence to support his claim. It thus appears under the rule, a statement of claim of the form prescribed, is treated by the board as evidence. Just what the board regarded as a pleading is left uncertain.

In the case of the Farmers canal, since the company owning the same did not file statement of claim before the first hearing, and not until more than two months thereafter, evidence other than the statement of claim was essential.

The whole record in the matter of said claim, according to the views of the supreme court of Nebraska, consisted of the following:

(a) A posted notice of intention in advance of construction, bearing date September 16, 1887.

(b) Another like posted notice, dated November 17, 1890.

(c) A third posted notice of intention, of March 12, 1895.

(d) Evidence introduced before secretary Akers of July 17, 1896, at which time three witnesses, Ford, McCoskey and Wright, testified.

(e) A sworn statement of "Claim for the Waters of the State of Nebraska," verified by William H. Wright, president of The Farmers Canal Company, September 15, 1896, and filed in the office of the secretary of the state board on September 19, 1896.

(f) The opinion of the secretary, filed in his office at Lincoln, Nebraska, January 7, 1897.

(g) An affirmance of that opinion, with sundry others, by the state board, on April 7, 1897.

Out of this record, the supreme court of Nebraska has assumed to hold that the affirmance above noted as (g), creates a conclusive adjudication in favor of the present owners of the Farmers canal, of a complete vested appropriation for 1,146.71 second-feet of water from the South Platte river, with priority of September 16, 1887, senior and paramount to the appropriations and priorities of all the plaintiffs in error.

Our contention is that the so-called "adjudication" as so construed, is not sustained by the pleading, evidence and record upon which it purports to be based.

Let us subject this record to a little scrutiny:

(a) Its starting point, which said court treats as "a pleading," is the statement of intention posted September 16, 1887. Its contents are stipulated. It declared the intention of the Farmers Canal Company to divert for irrigation, water sufficient to fill a canal of bottom width 40 feet and water depth 4 feet. There is no mention of the length intended, grade of the ditch, or of the area to be irrigated (28, P. R. 214-5). It thus appears that this first posted statement of intention is indefinite as to the carrying capacity of the canal and the area to be irrigated thereby.

If we be permitted to consider additional facts in the present record, we find the canal was constructed on a grade two feet per mile for the first mile, and seven-tenths of a foot per mile for the next 19 miles (29, P. R. 216). On said grade of seven-tenths of a foot per mile, according to Gelder's Hydraulic Calculator, we find a canal forty feet wide, with water depth four feet, has a carrying capacity of only 264 second-feet. It requires a strange process of judicial ratiocination to transform such a declaration of intention as was posted December 16, 1887, into "a pleading" of a vested appropriation of that date to sustain an "adjudication" of 1,142.71 second-feet.

(b) The second item in this record was a second notice of intention, posted on the headgate of said canal, about November 17, 1890, declaring that said company intended to appropriate for irrigation and other useful purposes, 2,000 miner's inches more—4,000 second-feet—by means of a canal of bottom width 80 feet, of side slopes one to one, of depth 8.82 feet at its diverting point, of average grade *not more than* two feet per mile. By some process of reasoning which we do not understand, the court regards this second notice of intention filed in November, 1890, as a sufficient "pleading" to justify an "adjudication" for an appropriation dating more than two years before the posting of said notice.

(c) The third notice of intention is shown by the opinion of the secretary to have been posted at the headgate, March 12, 1895. Its contents are not disclosed.

(d) The fourth item (date order) in this peculiar "record" is the testimony of three witnesses, Ford, McCoskey and Wright (37, 14-15, P. R. 255-259). Ford's testimony shows excavation work began November, 1887, making a ditch of bottom width twelve feet to carry water two feet deep for length of ten miles; also that some water was diverted in 1888 to irrigate some farms and that the entire area irrigated up to July, 1896, was possibly five hundred acres. McCoskey testified the ditch was enlarged to be 100 feet wide at its head, tapering down to a width of sixty feet about five thousand feet from its headgate, and thence thirty feet wide for about fifteen miles further. Wright testified that 1.5 miles from the headgate "*it is the intention*" to put in sandgates; below them to make the ditch forty-five feet wide; that its construction for seventeen miles below said sandgates was only one-half of that width (22.5 second-feet); that the preliminary survey ran ten miles further; that for fifteen miles below the first nineteen miles from headgate the work had been "opened" for full width. It was designed to furnish water for 80,000 acres under its *proposed line*; that most of the said land cannot be irrigated until it is constructed to the surveyed lower end; that work on the ditch had ceased.

(e) The fifth item of this "record" is the sworn statement of claim filed more than two months after said testimony was presented. A full synopsis thereof appears *supra* (38-40, P. R. between 260 and 261). Said claim affidavit in its seventh paragraph states the canal, eighty-one miles long, passes through certain sections shown on the accompanying plats; *that only nineteen miles, indicated by black line, is completed half size; the remaining sixty-two miles, indicated by red line, is not completed.* The ninth paragraph states total excavation amounts to about 3,125,000 cubic yards, of which the dirt so far removed is about 600,000. Paragraph 10 states that the estimated cost is \$350,000, of which \$98,000 has been expended. Paragraph 11 states *the intention* of the company to supply water to irrigate certain lands indicated on the plats to extent of 70,000 acres, and that *it was designed, when completed,* to furnish water for 80,000 acres. Paragraph 13 states that the time estimated as necessary to provide for application of water claimed is *five years from April 4, 1895.*

Commenting on the fourth and fifth items, which constituted all the evidence in the record before the secretary, even had the "pleading" (the notice posted September 16, 1895) been definite as to the size, length or irrigated area, said evidence failed to support the "claim." From no viewpoint did it show an appropriation at that time vested for more than the actual irrigated area at that time, viz.: 500 acres, requiring under the Nebraska water duty less than eight second-feet.

(f) Next in the "record" comes the opinion of the secretary (41-2, P. R. 261-266). Said opinion, after mentioning the three posted notices, states that the claim is allowed, that the canal is about eighty-one miles long and covers and reclaims about 80,000 acres; further, that the claim is allowed subject to the following limitations and conditions:

(1st) That the water shall be used for irrigation.

(2nd) The *time* to complete application shall extend to *September 1, 1904.*

(3rd.) The amount of the appropriation *shall not exceed 1,142 second-feet, nor the capacity of the canal, nor what is necessary to produce crops; in any event, "it shall be limited" to 1 second-foot for 70 acres "for each acre of land to which water has been actually and usefully applied before September 1, 1904."*

(g) The last matter in the "record" (converted by the supreme court of Nebraska into an "adjudication") is what is disclosed by the minutes of the state board at its meeting of April 7, 1887 (43, P. R. 280-1). It there appears that on motion of E. P. Smith (deputy attorney general) the findings of the secretary from which appeals had not been taken were affirmed in ten cases, including that of the Farmers canal.

The Frank Case.

In addition to the record before the state board, the decision of the supreme court of Nebraska in *Farmers Canal Co. vs. Frank* (72 Neb. 136, 100 N. W. 286) requires some attention. That case resulted from an appeal first to the district court and then to the supreme court, from a ruling of the state board of irrigation in 1902. The only parties before the court were Frank, an applicant for a permit, the Farmers irrigation district, an applicant for another permit, and Walker and the Farmers Canal Company (grantors of defendants in error here), resisting said applications. No plaintiff in error was or could have been a party to that proceeding. The opinion in said case shows that an imperfect record was before the supreme court and not a full record, as in the case at bar. This is shown by the following matters:

In the first column of page 288 of 100 N. W., it is said:

"On the 16th day of September, 1887, the Farmers Canal Co. * * * posted notice of appropriation for the diversion of water from North Platte river * * * to the extent of 1.142. 6/7 cu. ft. per second of time."

As just shown, the present record by stipulation of facts shows said posted notice of claim did not so specify but gave such dimensions as to provide for less than 300 second-feet.

We call attention to another matter in said opinion in the Frank case. In the first column of page 290 of 100 N. W. the court says:

“Laws 1895, p. 248, c. 69, sec. 21, provides for the issuance of a certificate by the state board to the appropriators, setting forth the name and post office address of the appropriator, the *priority number* of each appropriation, the amount of water appropriated, *the amount of prior appropriation*, and a description of the land to which the water is to be applied and the amount thereof.”

From this it is apparent in that case the court presumed, without the full record before it, that the provisions of said section 21 had been complied with, so that interested parties would have had an opportunity to appeal to the district court within sixty days. We have heretofore shown in the argument under subdivision 3 of Point VIII (143-144, 208-209) that the requirements of section 21 were not followed. It was not until its opinion in the present case, that the court, to reach the conclusion it did, was driven to treat said section 21 as directory only. Evidently it did not so consider it at the time of the Frank decision, else it was unnecessary for it to mention it with such particularity.

Moreover, the evidence of the witnesses Ford, McCoskey and Wright, heretofore referred to, which appears in the present record, was not in the record before the court in the Frank case. Neither was the court there advised that copies of each opinion of the secretary had been mailed only to the party whose canal was considered therein. Hence, it did not then know (as in the present record) that there was no opportunity for contests before the secretary, for appeals from his decision to the state board, for rehearings before that board, etc. Also the rules of the board showing that the conditions in the opinion conformed to the

notice and the rules providing for only a "first determination" or preliminary investigation, were not then before the court. This is apparent from the matters already pointed out, as well as from the following words of the court appearing in the first column of page 292 of 100 N. W.:

"The transcript of the proceedings before the state board * * * does not set forth in full the three notices of appropriation which were posted under the former law, nor fully set forth the original claim which was filed before the board."

Obviously, at that time the court regarded the "original claim" to be something different from the transcript of posted notices. In its present opinion it treats the posted notices as the *pleading*, and the statement of claim as *evidence* thereof. We have already shown that under all analogies to pleadings and evidence in courts of record, the first posted notice cannot be considered a pleading, and that the partially filled out statement of claim was not evidence of the posted claim.

Notwithstanding the presumptions indulged in by the court (perhaps properly, when an imperfect record was before it), it said in the Frank case—see second column of page 292 of 100 N. W.:

"Though the board in adjudicating the claim of Farmers Canal Company in all probability acted erroneously and made an adjudication that the Farmers Canal Company was entitled to an appropriation greater than it was possessed of at that time, still it had jurisdiction to hear and determine, and no appeal having been made from its determination, its order allowing the appropriation is final and cannot be attacked collaterally."

In that case the record was defective; *here*, it is complete. *There*, rival appropriators were not litigants before the court; *here*, they are. The court had ample opportunity in the present case, as was its duty under the law, to treat as jurisdictional, matters which in the Frank case it decided

were mere errors. It is under no compulsion because of the rule of *stare decisis* to follow its erroneous views there.

Having shown to demonstration that the record before the state board did not justify the construction placed upon its affirming order of April 7, 1897, whereby the supreme court of Nebraska has transformed it into a final and conclusive adjudication involving property rights, we now come to the point of this branch of the discussion, viz., that an adjudication unsupported by pleadings and the record before the tribunal adjudicating, is to the extent that it goes beyond pleadings and evidence, in excess of its jurisdiction.

It is regrettable that the supreme court of Nebraska did not follow the doctrine which it had previously announced, as follows:

“We are, however, unable to perceive wherein a judgment entered by a court confessedly outside of the issues submitted for its determination, can be said to rest upon any other or different principle than one in which the subject matter is entirely foreign to the jurisdiction conferred upon it.”

Lincoln National Bank vs. Virgin, 36 Neb. 736.

In another case, a decree going beyond the pleadings was treated as a nullity in a subsequent ejectment case where one of the parties relied upon a judicial sale based upon the erroneous part of the judgment.

Vorce vs. Page, 28 Neb. 294.

We urge, the alleged “adjudication” was a similar departure from the evidence and full record before the state board as if a court, on a complaint for \$500.00, rendered a judgment for \$80,000.00 on default, or on evidence showing only \$500.00 due from the defendant.

In such cases, while the judgment is not treated as a complete nullity, yet a court of equity subsequently, on the former defendant offering to do equity by paying what is justly due, will grant an injunction to prevent enforcement of the unjust balance.

Small vs. Collins, 5 Del. Ch. 234;
Hale vs. Bozeman, 60 Miss. 965;
Lang Syne etc. Co. vs. Ross, 29 Nev. 127;
S. C., 19 Am. St. 337.

8.

Further Departure from Pleading and Record.

In view of what precedes, we deem it unnecessary to state here more than appears in "Points and Authorities," subdivision 8 of point VIII (148-9).

IX.

Vested Prescriptive Rights Taken by
Judicial Fiat.

We have heretofore shown that the Farmers canal, when construction work thereon by The Farmers Canal Company ceased in November, 1893, had less than 5,662 acres susceptible of irrigation therefrom, and that from November, 1893, to August, 1905, there was no further construction work. During that eleven and one-half years, the total area actually irrigated was 2,000 acres, requiring under the Nebraska duty of water, less than 29 second-feet.

Under the well settled substantive law of Nebraska, ten years consecutive non-user of any part of an appropriation causes such part of the right to cease. That rule is based on statute law, viz.:

(1) Sections 2, 10, 11, 12 of the irrigation act of 1889 (108-9).

(2) Section 18 of the Nebraska irrigation act of 1895 (115).

(3) Section 6, title 2, Nebraska Code of Civil Procedure (125), relating to limitations of real actions.

Section 2 of the act of 1889, and section 18 of the act of 1895, *inter alia*, provide:

"When the appropriator * * * ceases to use it for such purpose, the right ceases."

If such language be construed literally, the right of an appropriation to water once vested would cease immediately with the cessation of use. However, the courts hold such construction to be too harsh. Hence, it is settled law that the cessation of use must continue during the period required to obtain a right to prescription under the statute limiting real actions in the particular state.

Said provision, found in both the Nebraska acts of 1889 and 1895, was borrowed or adopted from an earlier California statute. In the state last named, real actions were limited to five years.

The leading case in California on the subject is *Smith vs. Hawkins*, 110 Cal. 122. From the opinion it appears that one Ross in 1862 had constructed and thereafter for some time used a ditch having capacity to carry 457 miner's inches of water. In 1879, Hawkins built another ditch, heading on the same stream 50 feet below the Ross dam. For 13 years Hawkins, to the knowledge of Ross and of his grantee (the plaintiff Smith) had diverted and used water to the capacity of his ditch. For five years before the suit, Ross and Mrs. Smith did not beneficially use the Ross ditch. The judgment of the trial court in favor of the plaintiff Smith, was reversed. The opinion refers to section 1411 of the Civil Code of California, providing that when

“an appropriator or his successor in interest ceases to use it for such purposes, the right ceases.”

The supreme court of California in said case says:

“This section deals with the forfeiture of a right by non-user alone. We say non-user as distinguished from abandonment.”

The judgment of the district court was reversed; Hawkins was held to have the superior right.

The supreme court of Nebraska in the Frank case adopted the California rule, for it used these words:

“In California the time fixed by law for the limitation of action to recover real property is five years, and by analogy the courts hold the same

period is requisite to divest the title to water by non-user, and this idea seems to prevail in other arid states. Non-user must be continued for a time equal to the statutory limitations upon actions to recover the possession of real property, in order to lose the right of appropriation. The evidence in this case fails to show a non-user of the appropriation *for the term of ten years before this action was commenced. Hence, the Farmers Canal Company had not lost its appropriation by non-user.* We hold, therefore, that Roberts Walker and the Farmers Canal Company were, *at the time of the beginning of this proceeding*, the owners of and entitled to an appropriation of water to the extent and for the purpose as allowed to them by the state board of irrigation in 1897." (Italics ours.)

Farmers Canal Co. vs. Frank, 72 Neb. 136;
S. C., 100 N. W. 286, 293, 1st col.

Even if we take the "adjudication" of April 7, 1897, as the beginning of the ten-year period, it expired on April 7, 1907. It is not shown that more than 2,000 acres had then been irrigated from the canal. When a statute says that a *right ceases* on the happening of a certain contingency, it enforces itself. A suit or proceeding to have the loss judicially declared is unnecessary.

Bywaters vs. R. R. Co., 73 Tex. 627;

In re R. R. Co., 72 N. Y. 248;

Transit Co. vs. Brooklyn, 78 N. Y. 530;

In re R. R. Co., 75 N. Y. 338;

In re R. R. Co., 81 N. Y. 71;

Farnsworth vs. Ry. Co., 92 U. S. 66.

These cases show that the word "ceases," in such a statute, makes the legislation self-acting, while the words "shall be forfeited" call for a different rule and require a judicial declaration of loss or forfeiture. This distinction is clearly set forth in Galveston etc. R. R. Co. vs. State, 17 S. W. 67, 71, taken in connection with Bywaters vs. R. R. Co., *supra*. When the Bywaters case was decided, the Texas statute contained the words, "shall cease"; thereafter the legislature changed it so as to read, "shall be for-

feited"; the effect of the amendatory statute is discussed in the other case just referred to.

From what precedes, it is clear, before beginning this suit, by virtue of prescriptive statutes the appropriations of plaintiffs in error of their respective priorities, at least after April 7, 1907, if not before, were vested as freed from subordination to a senior right on behalf of the owners of the Farmers canal, except for less than 29 second-feet. This was a vested valuable property right, protected by the 14th amendment of the federal constitution against adverse legislative action by the state.

Normal School District vs. Blodgett, 155 Ill. 441 (46 Am. St. 348);

Lawrence vs. Louisville, 96 Ky. 595 (49 Am. St. 300);

Wuart vs. Winnick, 3 N. H. 473 (14 Am. Dec. 384);

Rockport vs. Walden, 54 N. H. 167 (29 Am. Rep. 131);

Willoughby vs. George, 5 Colo. 80;

McEldowny vs. Wyatt, 44 W. Va. 711 (45 L. R. A. 609).

Said cases declare the law to be that where a prescriptive right has been gained, or a defense because of the statute of limitations has become fixed, such right or defense cannot be taken away by the legislature extending the period of the old statute of prescription or limitations. Otherwise stated, any change in the law cannot be made retroactive without impairing the vested rights of property.

The same rule must be applied to judicial legislation. The 14th amendment protects vested interests against the action of a state acting by any or all of its departments. We have discussed this proposition in subdivision 5 of point VI, *supra* (191); we will also comment thereon *infra*, when considering subdivision 1 of point X (239-242). Plaintiffs in error had reclaimed from desert condition to fertility over 93,000 acres during the period of more than ten years, when the Farmers canal had so reclaimed only 2,000 acres.

The supreme court of Nebraska cannot, by its refusal to adhere to its previous decision and to rules of settled law, thereby in effect changing the prescriptive statute, destroy these vested rights acquired for the benefit of 93,000 acres, to aid a new speculation intended to render fertile land which before April 7, 1907, was desert.

It is of interest to note that said court (being in doubt as to the soundness of its holdings relative to the jurisdiction of the state board and the validity of its so-called conclusive adjudication), indulges in an equally strained effort to overcome the force of the prescriptive rights of plaintiffs in error. In its discussion of this point, the court refers (without citing it) to a late statute of Nebraska, providing for an adjudication by the state board relative to loss by prescription (83, P. R. 336).

Said late statute is the act of 1911 (125-127), which contains the provision:

"And if it appears that such water appropriation has not been put to a beneficial or useful purpose, or having ceased to be used for such purpose for more than three years, the same shall be declared canceled and annulled."

The previous part of the same section provides a procedure for the state board to have a forfeiture declared under that act. This act of 1911 was subsequent to the beginning of this suit. The court below was pressed hard to use that statute as an excuse for not declaring a loss by non-user of more than 29 second-feet under the Farmers canal for more than ten years before April 7, 1907. In that part of its opinion, it discusses financial difficulties of the Farmers Canal Company, and arbitrarily refuses to follow the settled law, stated *supra* under point II, subd. 3 (b) (173-175). The court seems to have lost sight of the fact that the prescriptive right of defendants in error was primarily based not on lack of diligence in construction, but on non-user of water.

X.

No Estoppel by Conduct.

The supreme court of Nebraska in its opinion seeks further to sustain the result reached, by assuming for the purpose of this further ground that it had erred on all points it had before decided (84, P. R. 336). We will show that it disregards that assumption throughout its discussion of estoppel. Moreover, it fails to state fairly the substance of the pleadings or stipulation of facts bearing on this subject.

If we eliminate everything which by said assumption must be treated as without validity as against plaintiffs in error, viz.: (1) the "adjudication" of April 7, 1907; (2) the excisions of all its conditions in the Frank case and again in the earlier parts of the opinion under review; (3) the treating of said "adjudication" so transformed as conclusive of the property rights of the defendants in error, and (4) the erroneous views of the court relative to prescription, there remains as a basis for the asserted estoppel only the following facts:

(a) That for four years from August, 1905, defendants in error expended large sums to enlarge and extend the Farmers canal;

(b) That plaintiffs in error gave no warning that the claim of early priority date to more than 29 second-feet on behalf of the Farmers canal would be resisted.

In its discussion of the point the court ignores the following matters:

(1) That plaintiffs in error were in possession of the water rights by which 93,000 acres were being irrigated during all those years, which is itself notice of their status.

(2) There is no occasion in law for a person in possession of real property to give warning to adverse claimants out of possession.

(3) That defendants in error do not *plead* any estoppel or facts showing or tending to show that had they been warned, the expenditures would not have been made.

(4) The stipulation of facts and the record as a whole does not show that defendants in error believed in good faith that they had a superior right for more than 29 second-feet.

(5) The stipulation of facts and the record as a whole does not show that with full warning defendants in error would not, as a junior appropriator, have made the same expenditures to divert water, there being ample supply in May and June to irrigate small grain by filling all canals.

(6) That plaintiffs in error were guilty of nothing approaching moral turpitude in continuing to irrigate crops needing water late in July, August and September, as they had for many years before, and in not beginning suit to quiet their title before it was invaded, or even threatened.

(7) That it would have been futile to begin suit to restrain building of improvements on the right of way of defendants in error.

(8) That all litigants had equal knowledge of the law.

No Pleading of Estoppel

All that approaches the suggestion of estoppel in the answer of the Tri-State Land Company is this: In 1906 it enlarged the headgate and upper portion of the Farmers canal and considerably extended the latter; in 1907 it further worked on extension so its then terminus was 60 miles from the headgate, making it adapted to irrigate 60,000 acres; since its ownership in 1904, it has claimed in good faith 1,142 second-feet of continuous flow as of priority December 16, 1887. In such *bona fide* belief it constructed and completed said canal to the terminus intended when the claim of the Farmers Canal Company was filed with the

state board in 1896. The amount of its expenditures are stated. All said matters the plaintiffs in error knew, but made no claim of superior right, "stood by" and allowed the pleader to expend its money in said belief and claim of right (21-22, P. R. 102-103).

Said answer does not state what in substantive law is essential to an estoppel *in pais*, i. e., that one who relies on an estoppel would have acted differently had the party it seeks to estop spoken instead of being silent.

The Enterprise irrigation district by its reply (for itself and other plaintiffs in error) in substance states, that no notice of said claim of superior right was ever served on the parties enjoying and in possession of the water in dispute; that said plaintiff learned only by rumor and hearsay of said asserted claim, and then *only shortly before beginning this suit*; that promptly after so learning, it disputed said claim except for the small amount of water which had been used under the Farmers canal before the expenditures of defendant began; that said defendant enlarged said canal with full knowledge that its asserted claim was and would be disputed. Said replication after said averments, has the following *denials*:

(1) That a claim of senior priority for 1,142 second-feet was made by said defendant, or if made, that ~~that~~^{it} was in good faith;

(2) That plaintiff knew of said claim of defendant; and

(3) That the plaintiff or other litigants "stood by" with knowledge of defendant's claim of superior right, or permitted defendant to make said expenditures in such *bona fide* belief as it asserts.

The replication closes with denial of every allegation in said answer not previously admitted, save such parts thereof as are admissions of facts alleged in the former pleading of said plaintiff (26-27, P. R. 148-149).

Evidence Does Not Sustain the Pleading.

There being an issue as to the *bona fide* belief of the Tri-State Land Company, the burden of proof is on it. Said burden was not sustained by the stipulation of facts.

The court in its opinion here under review assumes without proof that defendants in error *in good faith* made claim for more than 29 second-feet during their expenditures on and after August, 1905. It refers to the notices of the Farmers Canal Company posted and recorded in 1887, 1890 and 1895. Of course plaintiffs in error had constructive knowledge of said notices. The court, however, in this connection ignores the knowledge of everyone that the Farmers canal had not been constructed with diligence after said posting save to a small extent, also that water from the canal had been used to irrigate less than 2,000 acres, needing less than 29 second-feet. *With this knowledge* there could not have been any *bona fide* belief on the part of anyone that a claim made by purchasers from Walker after foreclosure, for more water than the ditch had theretofore supplied, had merit.

On the other hand, full possession and use by plaintiffs in error of the water in dispute and the intensive cultivation of an aggregate of 93,000 acres of formerly desert land under their canals, gave full notice of their rights to defendants in error.

In the case of Neilson vs. Parker, 19 Idaho 727, referring to the acquisition of the right of appropriation by actual diversion and use, the court says:

"This constitutes actual notice to every intending appropriator. * * * It is like a man being actually in possession of realty; indeed, a water right is realty." * * *

Because of said principle defendants in error were bound to take knowledge of the rights of plaintiffs in error, based upon their possession and use of the water in dispute.

In its opinion the court refers to certain printed records published by the state, referring to the "adjudicated

priorities," including that of the Farmers canal. It then assumes that plaintiffs in error had knowledge of said reports. The record in this case shows no reference thereto; nor does it show that any such reports were mailed to or seen by any plaintiff in error or any officer thereof. The court seems to forget its initial assumption on this subject. If it had erred on the validity of the secretary's opinion as construed in the Frank case and its binding or conclusive force against plaintiffs in error, why should it refer on the estoppel question to said reports? Plainly, they gave no added weight to what was void.

Plaintiffs in error were not and could not have been parties to the Frank case. Reference in published reports to void matters gave information of nothing. If the records were void, defendants in error were bound to know of that fact, and their claim could not have been made in good faith.

Every man is conclusively presumed to know the law. If the federal rights claimed by plaintiffs in error are decided in their favor, then it follows that the determinations made by said board were void from the beginning.

As stated by the supreme court of Nebraska in a cognate matter, referring to an unconstitutional statute, equally applicable to an unconstitutional "adjudication":

"It had been fatally smitten by the constitution at its birth."

Boales vs. Ferguson, 55 Neb. 565, 76 N. W. 18, 19.

This court, on a like subject, in an opinion prepared by Mr. Justice Field, said:

"It confers no rights. It imposes no duties. It affords no protection. It creates no office. It is, in legal contemplation, as inoperative as though it never had been passed."

Norton vs. Shelby Co., 118 U. S. 425.

Again in said case of Boales vs. Ferguson, it is said:

"Rights cannot be built up under it. Contracts which are dependent upon it for their

consideration are void. It constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. And what is true of an act void *in toto* is true also as to any part of an act which is found to be unconstitutional, and which consequently is to be regarded as never having at any time been possessed of any legal force."

Cooley, Cons. Lim., 188.

Again, in discussing the estoppel question, the court assumes it erred on the subject of prescription. The stipulated facts show that the defendants in error made what was in effect a wager of \$39,000 in advance about the decision in the Frank case (50-51, P. R. 295-296). This shows they had knowledge of the opinion therein when rendered. We have already shown, in discussing prescription, said opinion held that the appropriation then owned by Walker continued in force only because ten years non-user had not elapsed. They must have known that after April 7, 1907, if not before, under then settled law, whatever they may have imagined was a basis for their "claim" was lost by prescription. The very fact that they were willing to pay \$21,000 if the Frank case had been decided the other way, tends strongly to show that in such event, they would have expended the same \$1,600,000 to complete the canal, as owner of a junior priority. To use it during high water stages for wheat farming would probably have justified the extension and reconstruction. The necessity of expending so much money shows how wild was the estimate of Mr. Wright in sworn statement of claim filed in 1896, when he estimated such cost as only about \$350,000. All said matters must have been known to the defendants in error as part of the record of the appropriation they were buying from Walker. Nothing occurred to mislead them; they didn't plead they were misled or that they would have acted differently had plaintiffs in error proclaimed their superior rights from the house tops day after day.

The familiar rules of substantive law relative to the essential elements of a plea of estoppel *in pais* and that the

burden of proof rests on the pleader thereof was settled in Nebraska before the opinion under review was handed down.

Prior Nebraska Decisions in re Estoppel

In *Erickson vs. First National Bank*, 44 Neb. 722, the court said:

“If the defendants desire to rely either upon the estoppel or ratification, they should have pleaded in the answer the facts upon which they based such defense. The doctrine is plain and needs no elaboration to substantiate it.”

In *Slayden vs. Mitchell*, 42 Neb. 261, the court said:

“It is a well settled rule of this state, that an estoppel to be available as a cause of action or defense, must be specially pleaded.”

In *Nebraska Mortgage Loan Co. vs. Van Kloster*, 42 Neb. 476, the court said:

“It is charged finally that the loan company is estopped to assert title as against Blust, by reason of the statement of Van Kloster at the time of the assignment by him, to the effect that the company had no interest in the lease. The estoppel relied on, even if sufficient in law, is not available in this action for the reason that it is not pleaded.”

In *B. & M. R. R. Co. vs. Harris*, 8 Neb. 114, the court said:

“If an estoppel be relied on as a defense to an action, it must be pleaded or it will not avail the party.”

See also:

Schreiber vs. Platte, 19 Neb. 627.

The finding of estoppel without pleading or evidence to justify it amounts to taking the property of plaintiffs in error and transferring it to defendants in error without compensation, and hence without due process of law, for the following reasons:

1.

*The Fourteenth Amendment Protects the
Property Rights.*

We maintain with the utmost confidence that ^{for} the supreme court of Nebraska under such state of the pleadings and the record, to hold that there was an estoppel ^{though it errors} in all other matters, is nothing more or less than a retroactive judicial fiat.

If a Nebraska statute had in substance provided that on such pleadings and upon such a state of facts, an estoppel existed to prevent showing the very truth, and had that statute been applied to this case, it would have been held unconstitutional as a cloak to cover confiscation. Judicial legislation is always retroactive and comes equally under the inhibition of the fourteenth amendment to the national constitution.

Bradley vs. Lightcap, 195 U. S. 1;
Greenough vs. Greenough, 11 Pa. St. 489 (51 Am.
Dec. 567);
C. B. & Q. R. Co. vs. Chicago, 166 U. S. 226;
Hovey vs. Elliott, 167 U. S. 409.

Bradley vs. Lightcap, *supra*, reached this court on error to the supreme court of Illinois. Mrs. Bradley in 1867 became the owner of a debt secured by a mortgage on 1,200 acres of land. In 1868 a trust deed on part of the land with some small cash payment was given her to release the former mortgage. Soon thereafter default occurred through the mortgagor's failure to pay taxes. An agent of Mrs. Bradley took possession of the land in 1871; from 1872 until suit was brought *she and her tenants had exclusive possession*. In 1872, she brought suit to set aside the release of the former mortgage and to foreclose the same. Foreclosure sale occurred in 1879; she bid in the land at said sale for about one-third the mortgage debt, and obtained sheriff's certificate, but neglected to secure a sheriff's deed. Before July 1, 1872, there was no limitation in Illinois on the time when sheriff's deeds should issue to a holder of a

certificate of purchase. On that date a new statute took effect, providing that a sheriff's deed might issue at any time within five years from expiration of the redemption time, and if not issued within said five years, the certificate of purchase should become null and void. The statute purported to apply to pending matters.

When the case first reached the state supreme court (58, N. E. 221), said court held that after foreclosure and sale, all of Mrs. Bradley's rights became merged in the certificate of purchase, so that on her failure to secure a sheriff's deed in five years it became void. When the case reached said state supreme court the second time (66 N. E. 546), two federal questions were strongly urged: (a) that the act of 1872 impaired the obligation of the contract; (b) that the effect of the act as construed in the former appeal deprived Mrs. Bradley of property without due process of law. The state court ruled adversely to the claim of federal immunity.

This court held, in an opinion prepared by Mr. Chief Justice Fuller, that a federal question was involved; that Mrs. Bradley held the status of a mortgagee in possession before the act of 1872; that her foreclosure suit was merely pursuing a concurrent remedy; that the state court erred in holding that her property right could be lost by laches even under a statute attempting to fix the period of limitation; also that to apply said statute to her case would deprive her of property without due process of law, as well as impair the obligation of her mortgage contract.

In *Greenough vs. Greenough*, 11 Pa. St. 489 (51 Am. Dec. 567, 570), the court, by Gibson, C. J., held a certain statute intended to operate on wills already executed, could not be given such retrospective operation.

"It is destitute of retroactive force, not only because it was an act of judicial power, but because it contravenes the declaration in the 9th section of the 9th article of the constitution" (of Pennsylvania) "that no person shall be deprived of life, liberty or property except by the judgment of his peers, or the law of the land."

We maintain the holding of the supreme court of Nebraska in the case at bar creating retrospective estoppel, not pleaded or shown in evidence, exceeds the limits of power of the state of Nebraska lodged in any of its departments, to take property from plaintiffs in error and give it to defendants in error.

In *C. B. & Q. R. Co. vs. Chicago*, 166 U. S. 226, it was held in an opinion prepared by Mr. Justice Harlan:

"The prohibition of the 14th amendment of the federal constitution against taking property without due process of law, refers to all instrumentalities of a state, and is therefore violated whenever any person, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state."

"A judgment of a state court, even if it be authorized by state statute, whereby private property is taken for the state or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the 14th amendment of the United States constitution."

In *Hovey vs. Elliott*, 167 U. S. 409, this court, in an opinion by Mr. Justice White, sustained the court of appeals of New York in refusing to give effect (though urged on the "due credit" clause) to the judgment of a court of the District of Columbia, which entered a decree *pro confesso*, after striking an answer. It is stated at page 414:

"To say that courts have inherent power to deny all right to defend . . . is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends."

We submit for a court, where an estoppel is not pleaded, and where settled rules of substantive law show it does

not exist, to assert that it does exist, does in that particular case convert the court exercising such authority into an instrument of wrong and oppression.

2.

*The Nebraska Court Deprives Plaintiffs in Error
of All Remedies.*

Should the judgment and opinion of the supreme court of Nebraska here under review be affirmed because of its finding of an estoppel against an injunctive remedy, it would be affirmed *in toto*. There can be no pretense (if we assume for the purposes of argument that an estoppel was pleaded, which was not the case), that such assumed pleading would create an estoppel against an action for damages, yet if that opinion be affirmed, it stands affirmed in Nebraska for everything it decides, and in effect deprives plaintiffs in error of all remedies against the great wrong done them. If the estoppel was based on independent non-federal grounds—which is not the case—such grounds are not broad enough to sustain the entire decision.

For this reason this court on deciding the other questions in favor of plaintiffs in error, should review the question of estoppel on its merits.

It is the settled law of this court that to oust it of jurisdiction because the state court bases its decision upon an independent and non-federal ground, such ground must be *broad enough to sustain the entire decision.*

Murdock vs. Memphis, 87 U. S. 590.

XI.

*Alleged Estoppel in pais Based on Void
Adjudications.*

We maintain on close analysis it will be found that the estoppel by conduct asserted by the supreme court of Nebraska in its opinion under review, is not predicated on a

non-federal ground sufficient in itself to sustain the result reached.

1.

It is Not Independent.

A close scrutiny of said opinion shows that the pretended estoppel is not independent of the void "adjudication" of the state board, or of the erroneous construction placed thereon in *Farmers Canal Company vs. Frank*, 72 Neb. 136, as well as in the case at bar. It makes the fact of said proceedings before the state board and the construction thereof in the Frank case (to which plaintiffs in error were not and could not have been parties) its starting point and one of its chief elements. For this reason, as shown by cases cited *infra* under XI 3 (c) (245-6), it is subject to review here.

2.

Interwoven with Void Proceedings.

The argument for estoppel contained in the opinion under review, from beginning to end (84-88, P. R. 336-340) refers to the mailing of notices and printed rules of procedure to the several plaintiffs, to the filing of claims before the state board, to the Frank application, to the decision of the court in *Farmers Canal Company vs. Frank*, in June, 1904, to the secretary's notice to appear before him, to the rules prescribed by the board about rehearings, appeals and contests, and other like matters we have so fully discussed in other branches of the case. In other words, though the court introduces the discussion of estoppel with the condition, "if the other contentions be decided in plaintiff's favor," yet it uses matters on which it bases those "other contentions" as elements of the estoppel itself. The federal questions heretofore discussed are so interwoven in the court's own opinion with that of the pretended estoppel, that it cannot be treated as an independent non-federal ground for the decision reached.

3.

Attempt to Evade Federal Questions.

From what precedes, it is apparent that the supreme court of Nebraska on the estoppel subject indulges in a strained effort to evade the federal questions, but in that, manifestly does not succeed.

3 (a)

*It is Unsupported by Any Principle of
General Law.*

This court has held, in an opinion by Mr. Justice Strong:

“No principle is better settled than that a party is not estopped by his silence unless it has misled another to his hurt.” • • •

Philadelphia W. & B. R. Co. vs. Dubois, 12 Wall. 47.

In another opinion prepared by Mr. Justice Field referring to estoppel, the court says:

“For its application there must be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud. An estoppel *in pais* is sometimes said be a moral question. Certain it is, that for the enforcement of an estoppel of this character, such as will prevent a party from asserting his legal rights to property, there must generally be some degree of turpitude in his conduct which has misled others to their injury.”

Henshaw vs. Bissell, 18 Wall. 255, 271-2.

The same doctrine is repeated in an opinion of the same learned judge in Brant vs. Va. C. & I. Co., 3 Otto 326, and also by numerous state courts of high authority. To illustrate, we cite:

Kendall vs. Tracy, 64 Vt. 522.

Lower Latham Ditch Co. vs. Louder Irr. Co., 27 Colo. 267.

Priewe vs. Wis. S. L. Imp. Co., 103 Wis. 537 (79 Am. St. 904).

The supreme court of Nebraska has recognized its force in numerous cases, as shown *supra* in discussing Point X.

3 (b)

The Court Misstates and Misinterprets Both the Pleadings and Stipulated Facts.

We consider the discussion had under point X (232-238), as well as the statement under that point in "Points and Authorities" (151-152) is sufficient here.

3 (c)

This Court Will Not be Deprived of Jurisdiction by Any Subterfuge.

We have already referred to the holding of this court in *Bradley vs. Lightcap*, 195 U. S. 1.

There it was held that the interpretation put upon a statute by the supreme court of Illinois, whereby a mortgagee in possession of land was deprived of her property because of her failure to perform the act of getting a sheriff's deed, deprived her of property without due process of law. This is parallel to the situation here, where plaintiffs in error, by the erroneous holding of an estoppel, are deprived of property, of which they were in actual possession, because of their not prematurely bringing a suit to quiet title against a rival claimant. The essential point is the same in both cases. It is foreign to our whole judicial system and to the ancient "due process of law" to require a person *in possession* of property to take active, positive steps against others under penalty of losing it.

In *Terre Haute & I. Co. vs. Indiana*, 194 U. S. 579, this court, in an opinion prepared by Mr. Justice Holmes, held that where a certain legislative act impairs the obligation of contracts, or deprives of property without due process, this court will determine for itself what the rights of plaintiffs in error really were. It was further held that it cannot decline jurisdiction of a case, because the state court put forward an untenable construction of statutes; for to hold

otherwise would be to open an easy method of avoiding the jurisdiction of this court.

While there, the impairing obligation of a contract clause as well as due process was under consideration, we urge the principle announced applies with equal force where a state court manifestly, after denying rights claimed under the federal constitution, asserts as another ground an equally erroneous view of a matter of general substantive law.

Schlemmer vs. Buffalo Ry. Co., 205 U. S. 1, was an action for damages for negligence where a federal statute, relied on, required automatic couplers. If the same were not supplied it deprived the railroad company of the defense of assumption of risk. The plaintiff was non-suited in the state courts, which held no federal question was involved, basing their decisions upon the finding that the evidence showed contributory negligence. It was held, in an opinion by Mr. Justice Holmes, that the evidence did not justify the court in finding contributory negligence; that the state court really allowed the defense of assumption of risk under a different name, confusing the two defenses, and that said erroneous holding deprived the plaintiff of a right under the federal act.

In *Vandalia Ry. Co. vs. Indiana*, 207 U. S. 359, the judgment of the state court was affirmed, because this court agreed with it on the merits. But this court there says:

“A case may arise in which it is apparent that a federal question is sought to be avoided, or is avoided by giving an unreasonable construction to pleadings.”

In *Garr, Scott & Co. vs. Shannon*, 223 U. S. 466, this court agreed with the state court on the merits, but in an opinion prepared by Mr. Justice Lamar, it was held that where the decision of a federal question necessarily controls the case, jurisdiction is not defeated by the state court, putting the decision on a matter of local law not warranted by the record.

To the same point we cite:

Klinger vs. Missouri, 13 Wall. 257;
McCullough vs. Va., 172 U. S. 112.

XII.

Errors in Opinion of Supreme Court of Nebraska.

The previous discussion renders any further critical review of the opinion unnecessary.

Speaking of it generally, we note as prominent therein three elements:

1. The court evidently started with the desire to reverse the trial court, and makes a very labored and partisan argument to reach a pre-ordained conclusion.

2. It wholly fails to analyze the rules adopted by the state board and by its secretary under its authority. It assumes, because there were *headings in said rules* about rehearings, appeals and contests, that due process was afforded to the parties concerned to have such contests, rehearings and appeals.

3. In referring to the arguments of counsel for certain plaintiffs in error (appellees in that court) respecting the liberal time rule for application of water by canal owners whose canals are able, ready and willing to furnish water to farmers, under the rule discussed *supra* under point II, subd. 5 (177-178), it ignores and disregards the controlling fact that the Farmers Canal Company was not ready, able and willing to furnish water to the 80,000 acres of then arid land which defendants in error now seek to supply, because it did not have a canal extended to reach more than 5,661 acres thereof. From the ending of construction work in 1893, until some time in the summer of 1907, its grantees after foreclosure were not able, ready or willing to supply water to more than 5,661 acres.

The argument of counsel to which it refers is that of the Hon. G. J. Hunt, who appeared in that court as attorney for two of the present plaintiffs in error, viz., the owners of the Belmont and the Alliance canals, who had completed their works with diligence, but who had been unable to dispose of water as fast as hoped because of slow settlement of farmers along the lines of said canals. The court makes a labored effort to apply the doctrine contended for by

Judge Hunt to a very dissimilar situation, to-wit, that of the Farmers canal (70-71, P. R. 325-326). In that part of the discussion the court, in referring to Nevada Ditch Co. vs. Bennett, 60 Am. St. 777, and elaborate note, dwells upon what is stated in the note to be against the weight of the authorities, and ignores the principal case to which that note is appended.

All these matters indicate what may have been a subconscious bias to reach a preconceived conclusion, which seems to have dominated the court below throughout.

CONCLUSION.

We have endeavored to present our views quite fully on all the points involved, in abiding confidence that gross injustice was done to plaintiffs in error by the supreme court of Nebraska, while the trial court rendered a decree in strict accord with the law and stipulated facts.

Plaintiffs in error respectfully pray that the judgment of the supreme court of Nebraska be reversed and that the case be remanded to that court with instructions to set aside its judgment of dismissal and in lieu thereof to remand the case to the district court of Scottsbluff county, Nebraska, with instructions to affirm the original judgment and decree of that court referred to in the record.

Respectfully submitted,

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No. 48

OCT 7 1911

JAMES D. HARRIS

IN THE
SUPREME COURT
OF THE
UNITED STATES

THE ENTERPRISE IRRIGATION DISTRICT, THE RAMSHORN DITCH
COMPANY, THE GERING IRRIGATION DISTRICT, THE CENTRAL
IRRIGATION DISTRICT, THE CASTLE ROCK IRRIGATION CANAL
AND WATER POWER COMPANY, THE MINATAKA MUTUAL
CANAL AND WATER POWER COMPANY, THE STRAMBEDGE
DITCH COMPANY, THE NINE MILE IRRIGATION DISTRICT,
THE ALLIANCE IRRIGATING CANAL AND WATER POWER
COMPANY, THE CHIMNEY ROCK IRRIGATION CANAL AND
WATER POWER COMPANY, THE WINTERS CREEK IRRIGATION
COMPANY, THE BROWNE CREEK IRRIGATION COMPANY,
AND THE BELMONT IRRIGATING CANAL AND WATER POWER
COMPANY, PLAINTIFFS IN ERROR.

THE TRI-STATE LAND COMPANY AND THE FARMERS MUTUAL
CANAL COMPANY, DEFENDANTS IN ERROR.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR.

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ants in Error, Tri-State Land Company and the Farmers
Mutual Canal Company.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

THE ENTERPRISE IRRIGATION DISTRICT, THE RAMSHORN DITCH COMPANY, THE GERING IRRIGATION DISTRICT, THE CENTRAL IRRIGATION DISTRICT, THE CASTLE ROCK IRRIGATION CANAL AND WATER POWER COMPANY, THE MINATARE MUTUAL CANAL AND WATER POWER COMPANY, THE STEAMBOAT DITCH COMPANY, THE NINE MILE IRRIGATION DISTRICT, THE ALLIANCE IRRIGATING CANAL AND WATER POWER COMPANY, THE CHIMNEY ROCK IRRIGATION CANAL AND WATER POWER COMPANY, THE WINTERS CREEK IRRIGATION COMPANY, THE BROWNS CREEK IRRIGATION COMPANY, AND THE BELMONT IRRIGATING CANAL AND WATER POWER COMPANY, PLAINTIFFS IN ERROR.

VS.

THE TRI-STATE LAND COMPANY AND THE FARMERS MUTUAL CANAL COMPANY, DEFENDANTS IN ERROR.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF DEFENDANTS IN ERROR.

CARL C. WRIGHT AND FRED A. WRIGHT, *Attorneys for Defendants in Error, Tri-State Land Company and the Farmers Mutual Canal Company.*

Before discussing in any way the points raised by the plaintiffs in error we desire to first challenge the court's attention to the fact that this court has no jurisdiction over the

present case for the reason that no federal question is involved. The supreme court of the state of Nebraska, in its decision of the case held, after ruling on the various propositions as to due process of law, *et cetera*, that the judgment of the lower court should be reversed on the grounds of equitable estoppel regardless of how it decided the other questions. Plaintiffs in error in their brief acknowledge that the supreme court of the state of Nebraska, did so decide. As we consider this conclusive in the case at bar we shall present our argument on this phase of the case separate from our argument on the rest of the case.

BRIEF ON JURISDICTION OF COURT.

The present case originated in the district court of Scotts Bluff county, Nebraska, and was an action by the present plaintiffs in error against the present defendants in error to obtain an adjudication of certain water rights in the North Platte river for irrigation. The defendants in error claim under an appropriation which was duly adjudicated by the state board of irrigation of the state of Nebraska. The district court of Scotts Bluff county found in favor of the present plaintiffs in error but upon appeal to the supreme court of the state of Nebraska this decision was reversed.

The present plaintiffs in error attack the adjudication of the state board of irrigation on various grounds alleging that the act creating the board and giving them power to adjudicate water rights was unconstitutional and that the board in adjudicating these water rights proceeded contrary to the Constitution of the United States in various matters pertaining to notice of the hearing, etc. The supreme court of the state of Nebraska ruled adversely on these propositions, but it based its opinion in the suit further on the question of estoppel.

The present defendants in error in the original action allege that the plaintiffs in error with full knowledge of the defendant's in error claim of right to a prior appropriation set by and acquiesced in the expenditure of large sums of money by the defendants in error and the supreme court of the state of

Nebraska held this to be a plea of estoppel sufficient to estop the plaintiffs in error from maintaining the present error. The decision of the supreme court found in 138 N. W. 171, 92 Neb. 121, and in the printed record beginning at page 315, conclusively shows that the supreme court based its opinion on a non-federal question and that its opinion on this question is broad enough to support the judgment regardless of the decision on the other questions. That part of the opinion delivered with this question is found beginning on page 336 of the printed record and is as follows:

"Upon the question whether even if the other questions be decided in favor of plaintiffs and against defendants, plaintiffs are entitled to the aid of a court of equity and are not estopped by reason of their own conduct, it is necessary to examine the facts as admitted by the pleadings and evidence.

"All parties who took any part in the hearing knew or were charged with knowledge that notices had been posted by the Farmers Canal Company and recorded in the office of the county clerk prior to the taking effect of the act of 1895. The act of 1889, by authorizing such filing and recording constituted the same a public record of which all persons interested were bound to take notice. These notices showed that the Farmers Canal Company by the first claimed a quantity of water sufficient to fill a canal 40 feet wide on the bottom and to carry water to a depth of four feet, and by the others, water in addition to its former claim to the amount of 200,000 miners' inches, the canal to be 80 feet wide and 8.84 feet deep at point of divergence, slope one to one, with an average grade not greater than two feet to the mile. Under section 32 of the act of 1895, 50 miners' inches shall be deemed equivalent to a cubic foot of water per second, so that in the aggregate the waters claimed largely exceeded in quantity the 1142-6/7 cubic feet per second, which were allowed. Indeed we find no specific denial of this knowledge either in the pleadings or the evidence. After denying knowledge of the filing of the claim of the Farmers Canal Company with the board, of the hearing thereon, and of the opinion and resolution, the petition alleges, 'nor did the plaintiff herein or its grantor acquire any knowledge whatever of the above mentioned transactions of said board and its secretary for several years after they had taken place.'

"This is not a negation of knowledge of the claims of the Farmers Canal Company but only of knowledge of the transactions of the board. It also amounts to an admission that it required knowledge 'several years after' 1896 and 1897, when the transactions mentioned took place. The expression 'several years after' is vague and indefinite and since the language used must be construed most strongly against the pleader it cannot, we think, be taken to mean a space of about nine years from July, 1896, when the hearing was had, and January, 1897, when the resolution passed, and the time when the defendants began the work of reconstruction and enlargement on a large scale in August, 1905. So that there is no denial of want of knowledge even of the board's action before the latter time.

"The petition alleges that the defendants 'have, through their duly authorized officers and agents, at various times asserted and declared that they have a right of appropriation of water from the North Platte river to the extent of 1142-6/7 cubic feet per second of time * * * which is prior to the right of appropriation acquired by this plaintiff.' The time at which these declarations were made is not disclosed. But if only recently made the pleader would, no doubt, have taken advantage of the fact. The evidence also shows the mailing of notices and of printed rules of procedure to the plaintiffs and that at different dates from June 24, to October, 1895, the plaintiff's grantor and ten other claimants, including the Farmers Canal Company filed claims before the state board and that on July 17, 1896, another claim was filed by the owners of the Minatare ditch. On the same day that the opinion on Farmers Canal Company was filed by the secretary he also filed opinions in the claim of the Enterprise Ditch Company, plaintiff's grantor, and in those of three of the other plaintiffs. It is apparent, therefore, that all claimants who filed claims with or produced evidence before the board had notice of its transactions at least to the extent of being aware that a hearing would be had, and were also charged with notice of the rules of practice adopted by the board. The evidence shows also that some rehearings, presumably on request were had upon claims.

"In April, 1902, the Frank application was filed with the state board. In June, 1902, the Farmers Irrigation District filed also a like application. These applications were contested before the board, appeal was taken to the district court and supreme courts. Judgment was rend-

ered on June 9, 1904, in favor of the Farmers Canal Company upholding its prior right to the appropriation it claims.

"In 1905 the Tri-State Land Company expended \$133,066.46 in their work on the canal. In August, 1906, it began work on the enlargement of the 19 mile portion of the canal. In the spring of 1907, the canal was constructed to its full size for a distance of 40 miles below the headgate. In September, 1906, it was given leave by the state board to construct a needle dam across the river below the headgate and this work was begun in October of that year. In all there was expended in 1906 in these operations the sum of \$499,491.87. In 1907, a new headgate was built and the canal further extended at an aggregate cost of \$323,386.87. In 1908 the work was continued at a cost of \$5,240.67. In 1909, \$464,536.13 was expended in extension and improvement. In 1910, work was continued on the headgates, needle dam, waste gate at a total cost of \$198,529.70. The total amount expended by the Tri-State Company in construction from February, 1905, to October 31, 1910, was \$1,651,138.41, of which amount over \$950,000 was expended before the original petition in this case was filed.

"The question is whether the plaintiffs could stand idly by while the defendants, openly claiming a prior right to water sufficient to water the lands for which the appropriation had been allowed by the state board, expended nearly a million dollars in the work, and then after the work was practically finished, enjoin the use of the water which the works were constructed to carry.

"Under section 10 of the act of 1895, the state board is required to prepare and render to the government biennially full reports touching all the matters and duties devolving upon the board by virtue of its office, and it is provided that 2,000 copies of the report should be printed, and distributed according to the provisions of the law providing for the printing of other state reports. This report is a public document of which we take judicial notice. The report for the years 1897 and 1898, contains a table showing the appropriations from the various streams of the state which had been allowed by the board since its organization in 1895, with the date of priority, and the amount adjudged to each appropriator. This table shows that the Farmers Canal Company of Omaha had been granted an appropriation of 1,142.87 second feet with headgate located on Sec. 3, Town 2, Range 58, Scotts

Bluff county, with priority of September 16, 1887, with the conditions mentioned and also shows the amount and priorities awarded other parties to this suit. This table is carried forward in each report published, so that the information therein contained has been available to all parties interested ever since early in the year 1900 until the present time. With all these facts before us we must find that plaintiffs had knowledge of the posted and recorded claims of the Farmers Canal Company; of the passage of the law of 1895 and of its provisions requiring the state board at its first meeting to make arrangements for adjudicating the priorities of all 'claims for appropriation now on record'; of the notice to appear before the secretary, and of the rules prescribed by the board as to rehearing, appeals, and contests; of the practice of the board in deciding claims by written opinions, copies of which were mailed to each claimant; of the fact admitted in its reply that ever since the Tri-State Land Company became the owner of the canal 'it claimed and still claims the right to 1142-6/7 cubic feet per second'; of the vast undertaking of the defendants in the completion of the canal, of the extensive work of the Tri-State Company in building dams and headgates and in excavation, comparable only to the construction of a railroad, and of the expenditure of hundreds of thousands of dollars in a sparsely settled country. Furthermore, the claims of all the parties except two originated by posting notices on the bank of the stream and recording copies in the office of the county clerk. When the state sought to determine for its own purposes the rights to the use of water which had vested, so that it might apportion that which still flowed in the river bed subject to appropriation, it gave all of these claimants an equal opportunity to assert their claims. They all took advantage of this privilege, their rights were determined and they all acquiesced. Opportunity for contests of the claims of others might interfere with the amount of water each claimed was afforded each of them under the rules adopted which were brought to their attention. They filed no contests, took no appeals but remained apparently content to recognize the authority of the board. Relying on these conditions, as well as upon the adjudication the defendants purchased the canal, worked upon it for years and spent vast sums of money in its completion so as to irrigate the specific land which it was originally designated to reclaim. During all these years no claim of superior right to this water seems to have been made, though it must be said that when the supply was short and while the defendants were not using

the water it was used by some of the plaintiffs, but this is customary, right, and proper when water is flowing in the stream unused. If a prior appropriator for carriage is not ready to use water, the use of it by another is not equivalent to an adverse user which of itself would give notice of a hostile claim. *Smith v. Duff*, 39 Mont. 374, 102 Pac. 981; *Featherman v. Hennessy*, 43 Mont. 310, 113 Pac. 751; *Ison v. Sturgill*, 57 Ore. 109, 109 Pac. 579; *Weidensteiner v. Mally*, 55 Wash. 79, 104 Pac. 143. Under these circumstances and having this knowledge it would be contrary to the plainest principles of equity if plaintiffs might stand silently by seeing the defendants engage in such a monumental work under claim of right and utter no word of warning as to their own claims which if eventually established would be depriving defendants of the water which the canal was built to carry, condemn the whole enterprise to failure and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiff after the works were practically finished and the money expended to insist upon claims which had they been asserted in good time would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined.

"In *Fremont Ferry & Bridge Co. v. Dodge County*, 6 Neb. 18, the facts were that the company sought to enjoin the county from erecting a bridge which would take away tolls from a bridge built by plaintiffs. It was shown by the answer that a bridge had been erected by the county a part of which was out of repair and which it was about to repair. The court said: 'The silence of the plaintiff when knowing its own rights, and having full knowledge of the steps taken by the defendants to build the bridge, will estop it after the completion of the work, or after large expenditures of money in construction had been made; for such silence lulls to rest instead of warning danger, and in the language of the books, it becomes a fraud.' In a case where a mill owner entitled to the use of water as a riparian owner remained quiescent while an irrigation company expended large sums in constructing its canal, this court refused to grant an injunction against the use of the water for irrigation, saying: 'It is clearly established by the proofs that the construction of the irrigating ditch was undertaken and carried out by the defendant company in good faith in accordance with the purpose of its creation, at a cost of many thou-

sands of dollars, and in the belief on the part of its promoters and managing officers that it was entitled to divert the water of the Republican river. It is also practically undisputed that the plaintiff was from the first duly advised of both the undertaking and the purpose of the defendant, and it is certain that he interposed no objection thereto until after the substantial completion of the work. The rule which denies relief in equity to one who has slept upon his rights applies in all its force to cases where the defendant is engaged in a work of public interest. In fact there is no principle more firmly established in the jurisprudence of this country than that a suitor who has by his laches made it impossible to restrain the completion or use of public works without great injury to his adversary or the public will be left to pursue his ordinary legal remedies.' *Clark v. Cambridge & Arapahoe I. & I. Co.*, 45 Neb. 798. See also cases cited in each of these opinions. *New York City v. Pine*, 185 U. S. 93, 22 Sup. Ct. Rep. 592.

"We think the cases cited by plaintiffs are so different in the facts before the court that they do not furnish any guide in this case.

"Whether the original adjudication was more than a mere administrative proceeding for the information of the board or not, and even if it should be held that the right to the full appropriation was lost by non-user before the TriState Land Company fully constructed its canal, we agree that the plaintiffs are estopped to maintain this action."

The supreme court of the state of Nebraska having disposed of this case on a non-federal question sufficiently broad to dispose of the entire case, this court has no jurisdiction to review its judgment.

Brooks v. Missouri, 124 U. S. 394, 31 L. Ed. 454.

Hale v. Akers, 132 U. S. 554, 33 L. Ed. 442.

Hopkins v. McClure, 133 U. S. 380, 33 L. Ed. 660.

Beaupre v. Noyes, 138 U. S. 397, 34 L. Ed. 991.

Beatty v. Benton, 135 U. S. 244, 34 L. Ed. 124.

Wood v. Skinner, 139 U. S. 293, 35 L. Ed. 193.

East Tenn. v. Frazier, 139 U. S. 288, 35 L. Ed. 196.

Henderson Bridge Co. v. Henderson, 141 U. S. 679, 35 L. Ed. 900.

Hammond v. Johnston, 142 U. S. 73, 35 L. Ed. 941.

- Delaware City v. Reybold*, 142 U. S. 636, 35 L. Ed. 1141.
Haley v. Breeze, 144 U. S. 130, 36 L. Ed. 373.
O'Neill v. Vermont, 144 U. S. 323, 36 L. Ed. 450.
Northern P. R. Co. v. Ellis, 146 U. S. 458, 36 L. Ed. 504.
Eustis v. Bolles, 150 U. S. 361, 37 L. Ed. 1111.
Connecticut v. Woodruff, 152 U. S. 689, 38 L. Ed. 869.
Harrison v. Morton, 171 U. S. 38, 43 L. Ed. 63.
Bacon v. Texas, 163 U. S. 188, 41 L. Ed. 132.
Egan v. Hart, 165 U. S. 188, 41 L. Ed. 680.
Del Castillo v. McConnico, 168 U. S. 674, 42 L. Ed. 622.
Pierce v. Somerset, 171 U. S. 641, 43 L. Ed. 316.
 172 U. S. 465, 43 L. Ed. 517.
Chappell Chemical & Fertilizer Co. v. Sumpshur Mines,
Bank v. Railroad, 163 U. S. 325, 41 L. Ed. 177.
Woods v. Chesbrough, 228 U. S. 672, 57 L. Ed. 1018.
Preston v. Chicago, 226 U. S. 447, 57 L. Ed. 293.
Missouri, K. & I. v. Olathe, 56 L. Ed. 156.
Gaar & S. Co. v. Shannon, 56 L. Ed. 510.
Fisher v. New Orleans, 54 L. E. 1099.
Los Angeles v. Los Angeles, 54 L. Ed. 736.
Cincinnati v. Slade, 54 L. Ed. 390.
Waters-Pierce v. Texas, 212 U. S. 112, 53 L. Ed. 431.
Rogers v. Jones, 214 U. S. 146, 53 L. Ed. 965.
Arkansas v. Bank, 207 U. S. 270, 52 L. Ed. 201.
Mobile v. Mississippi, 52 L. Ed. 1016.
Leath v. Thomas, 207 U. S. 93, 52 L. Ed. 118.
Adams County v. Burlington, 112 U. S. 123, 28 L.
 Ed. 678.
Hale v. Lewis, 181 U. S. 473, 45 L. Ed. 959.
Sherman v. Grinnell, 144 U. S. 198, 36 L. Ed. 403.
Lowrey v. Silver City G. & M. Co., 177 U. S. 196, 45
 L. Ed. 151.
Gillis v. Stinchfield, 159 U. S. 658, 40 L. Ed. 295.

That questions of estoppel are sufficient to sustain the judgment of a state court although a federal question is presented, and that a judgment supported on such a decision cannot be reviewed in the supreme court of the United States cannot be

doubted. In *Gillis v. Stinchfield*, *supra*, there were certain questions under the federal statutes relative to mining raised. The supreme court, however, in the opinion by the then chief justice, dismissed the writ of error, saying:

"But the decision of the supreme court was clearly based upon the estoppel deemed by that court to operate against plaintiffs in error upon general principles of law and the statute of California in respect of such a conveyance as that to Stinchfield, irrespective of any Federal question. And this was an independent ground broad enough to maintain the judgment. The writ of error must therefore be dismissed."

In the case of *Lowrey v. Silver City G. & S. M. Co.*, *supra*, there was likewise involved certain questions of mining law under the federal statutes. The supreme court in the opinion by Mr. Justice Brewer, dismissed the writ of error, saying:

"The supreme court of the state placed its decisions upon two grounds: First, that, although the Evening Star claim included the original discovery shaft of the Wheeler claim, it did not thereby destroy that claim in view of the fact that long prior to the location of the Evening Star the owners of the Wheeler had located a new shaft and developed the mine in that shaft. *Gwillim v. Donnellan*, 115 U. S. 45, 29 L. Ed. 348, 5 Sup. Ct. Rep. 1110, was held not applicable. The other ground of estoppel by virtue of the lease under which two of the plaintiffs in error acquired possession. While the former ground is the one principally discussed in the opinion, the latter was adverted to in a few words at its close. The latter is sufficient to dispose of the case in this court. *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111, 14 Sup. Ct. Rep. 131. See also *DeLamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. Ed. 872, 20 Sup. Ct. Rep. 715, and cases cited in the opinion. The writ of error is dismissed."

In the case of *Sherman v. Grinnell*, *supra*, there was an action brought by the executors of the former collector of the port of New York against one Sherman to recover certain moneys collected from the United States by Sherman as attorney for the plaintiff's testator. The defendant (plaintiff in error in the supreme court) raised certain questions as to the construction of the United States statute under which the testator claimed funds. The state court, however, held that inasmuch as he had

received the money as attorney, he was estopped to deny his client's right thereto and the court in an opinion by Chief Justice Fuller dismissed the case, saying:

"The court simply decided that he could not deny his client's title after having collected the money for him and he assigned as error that the court held that he was so estopped. The ground upon which the judgment rested was broad enough to sustain it without deciding any Federal question, if there were any in the case. As to the admission of the ward and of the receipt in evidence, the rulings involved the application either of the general or the local law of evidence, and as such furnish no ground for our interposition."

In the case of *Hale v. Lewis* there was involved the question of the validity of the statute of the state of Wisconsin, relative to building and loan associations. The statute of Wisconsin required foreign building and loan associations to deposit certain securities with the state treasurer to be held in trust by him to protect members of the association who were residents of that state in case of insolvency. The building and loan association in question having become insolvent, a receiver appointed in Wisconsin was proceeding to distribute the funds deposited with the Wisconsin treasurer to the members of the association residing in Wisconsin to the exclusion of other members. The statute of Wisconsin was attacked as being unconstitutional, as being contrary to the Constitution of the United States. The supreme court of Wisconsin, however, held that where the building and loan association complied with the Wisconsin statute and did business in Wisconsin, it was estopped to set up its invalidity. This court held that the decision of the supreme court of Wisconsin holding that the corporation was estopped to attack the constitutionality of the law, was a decision on non-federal question and, therefore, dismissed the writ of error. To the same effect is the case of *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111.

There can be no question but that the decision of the supreme court of the state of Nebraska, on the question of estoppel was correct. We will not, however, argue this point or call the court's attention to the evidence supporting this plea. As we

understand the rule, this court does not inquire as to the correctness or incorrectness of the decision of the state court on the non-federal question.

Mr. Justice Holmes in the case of *Arkansas S. R. Co. v. German National Bank*, 52 L. Ed. 201, 207 U. S. 268, says:

"Whether the supreme court was warranted in assuming the facts to be as it set them forth is no concern of ours. The important thing is that it was at pains to state them, and that it can have had no purpose in doing so other than to establish a liability under the contract at common law. If the statute imposed liability for delivery without a surrender of the bills of lading, whether the contract was performed or not, there was no need to go into these details. It is true that the court refers to and upholds the statute, but it does so after stating the duties and liabilities of the carrier at common law, and says more than once that the relevant enactment is for the enforcement of duties already existing; that is, it would seem, that it is only declaratory so far as this case is concerned. The court treats the contract itself as requiring a delivery to shipper's order, and only upon a production of the bills of lading properly endorsed. Its concluding words are, 'Under the contract, as shown by the bills of lading, it was relieved of liability on account of the storage, but not of the failure to deliver according to law.' Whether the analysis of the contract was correct or not, and whether or not there were other grounds of common law upon which the defendant ought to have escaped, are matters upon which we cannot speculate. When we see that the opinion of the court upon the constitutional question first appearing in that opinion was not necessary to its judgment upon the case, we have nothing more to do."

And also in the same opinion says, referring to the jurisdiction of the Federal supreme court being defeated by a decision on a non-Federal question:

"Moreover, ordinarily this court will not inquire whether the decision on the matter not subject to its revision was right or wrong."

In the case of *Leath v. Thomas*, 207 U. S. 93, 52 L. Ed. 118, the court in dismissing the writ of error on the ground that the decision of the state court on a non-Federal question was sufficiently broad enough to sustain judgment say:

"It is admitted that the general and well-settled rule is that in a case coming from a state court this court can consider only Federal questions and that it cannot entertain the case unless the decision was against the plaintiff in error upon those questions. *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429; *Sauer v. New York*, 206 U. S. 536, 546, 51 L. Ed. 1176, 1181, 27 Sup. Ct. Rep. 686. It is admitted further, that a decision upon those questions must have been necessary to the decision of the case, so that, if the judgment complained of is supported also upon other and independent grounds, the judgment must be affirmed or the writ of error dismissed, as the case may be. *Murdock v. Memphis*, *supra*. But *Murdock v. Memphis* does not stop there. It further establishes that when the record discloses such other and completely adequate grounds this court commonly does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result. 20 Wall 590, 635, 22 L. Ed. 429, 444; *Eustis v. Bolles*, 150 U. S. 361, 37 L. Ed. 1111, 1113, 14 Sup. Ct. Rep. 131; *Castillo v. McConico*, 168 U. S. 674, 679, 42 L. Ed. 622, 624, 18 Sup. Ct. Rep. 229."

None of the cases cited by plaintiffs in error are contrary to the views of the supreme court mentioned in the above cases. The case of *Schlemmer v. Buffalo Ry. Co.*, 205 U. S. 1, is a case where the federal employers' liability act was under consideration and the question involved was whether the plaintiff in the action had assumed the risk of his occupation. The supreme court of the United States searched the record to see whether the question of assumption of risk was involved or only the question of contributory negligence, but explains as its reason for so doing that the supreme court of Pennsylvania, whence the case came to the supreme court of the United States, used the terms assumption of risk and contributory negligence interchangeably in its former opinions and did not distinguish between them.

In the case of *Klinger v. Missouri*, 13 Wallace 257, 20 L. Ed. 635, the court stated the rule as follows:

"The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question

of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the State Court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction."

It will be noted that the court says that if it appears that the state court did, in fact, base its judgment on such independent ground and on the law raising the federal question, the supreme court of the United States will not take jurisdiction of the case, even though it might think the position of the state court an unsound one.

There can be no question that the state supreme court did base its decision in this case on an independent ground involving the federal question and, therefore, under the rule stated this court will not take jurisdiction, even though it might think the position of the state court an unsound one.

For these reasons we will not enter into any extended discussion of the question of estoppel. We will, however, call the court's attention to the fact that there was both pleading and evidence to sustain the findings of the supreme court of Nebraska.

We do not deny the proposition that an estoppel to be available must be plead, but it is not essential that the estoppel be formally plead or labeled an estoppel. If the facts from which the estoppel arise are shown by the pleadings, this is sufficient.

City National Bank of Hastings v. Thomas, 46 Neb. 861.

As shown by the opinion of the supreme court of the state of Nebraska, heretofore quoted, the evidence is amply sufficient

to sustain the adjudication on the question of estoppel and even if this were not so the pleadings of the plaintiffs in their reply would justify a judgment on the grounds of estoppel without evidence.

The supreme court of Nebraska, having disposed of this question on an independent federal ground as is admitted in plaintiffs' in error brief, this court has no jurisdiction and the writ of error should be dismissed.

POINTS AND AUTHORITIES RELIED ON BY DEFENDANTS IN ERROR.

I.

The federal supreme court has jurisdiction only to review federal questions and cannot review non-federal questions decided by the state court.

Mathews v. Zane, 7 Wheat, U. S. 164, 5 L. Ed. 425.

Franklin v. South Carolina, 218 U. S. 161, 54 L. E. 980.

Sylvester v. Washington, 215 U. S. 80, 54 L. Ed. 101.

II.

The state has power to require all persons to appear before any special tribunal designated by the state and establish their claim to any property that was formerly public property.

Barker v. Harvey, 181 U. S. 481, 45 L. Ed. 963.

Fort Lyon Canal Co. v. Ark. Valley S. B. & I. L. Co.,
(Colo.) 90 Pac. 1023.

Bottliler v. Dominguez, 130 U. S. 328, 32 L. Ed. 926.

III.

The state supreme court construed this statute to require the giving of notice, where the giving of notice is necessary to the constitutionality of any act, even though the statute does not in terms require such notice, yet the act is constitutional as it is implied that notice shall be given.

Paulson v. Portland, 149 U. S. 30, 37 L. Ed. 637.

P. & R. I. I. Co. v. Warner, 61 Ill. 52.

St. Joseph v. Geiwitz, 148 Mo. 210, 49 S. W. 1000.

B. & O. R. R. Co. v. P. W. & K. Co., 17 W. Va. 835.

~~*Re Road*, 109 Pac. 118.~~

IV.

The rules of the board required notice and the notice was in fact given. See printed record, pages 251-2, for rules; printed record, page 255, as to stipulation in re-notice.

V.

The parties complaining entered their appearance in the action and participated therein. This waived all objection as to the giving of the notice and objections to the statute not specifically requiring notice.

State ex rel. v. Fon Du Lac, 42 Wis. 287.

Cramer v. C. & P. R. R. Co., 5 Ohio St. 140.

Lynde v. Lynde, 181 U. S. 183.

Williams v. Eggelston, 170 U. S. 304.

VI.

The parties having once appeared in the tribunal were bound to take notice of all subsequent steps and no new notice was required.

Kohn v. Wagner, 1 Rob. La. 275.

Delaplaine v. Hitchcock, 6 Hill N. Y. 14.

Butler v. Thompson, 2 Fla. 9.

Sparrow v. Davidson, 77 N. C. 35.

29 Cyc. 1116.

VII.

The proceedings constituted due process of law inasmuch as provision was made for appeal to the courts where the matter could be finally adjudicated if the parties were dissatisfied with the adjudication of the board.

McGehee, Due Process of Law, 162, 368.

Reetz v. Michigan, 188 U. S. 505.

Gardner v. Bonesteel, 180 U. S. 362.

Bates & Guild Co. v. Payne, 194 U. S. 106.

People ex rel. Deneen v. Simon, 176 Ill. 165.

Farm Investment Co. v. Carpenter, 9 Wyo. 110.

State v. Thorne, 112 Wis. 81, 55 L. R. A. 956.

Gee Wo v. State, 36 Neb. ~~241~~ 241/

Lincoln Medical College v. Poynter, 60 Neb. 228.

Farmers Canal Co. v. Frank, 72 Neb. 136.

ARGUMENT.

I.

Plaintiff in error raises many interesting propositions in the discussion of the law in his brief. We do not, however, consider that it is necessary or even proper to attempt to answer all of these. So many of the questions are obvious questions of local law on which the decision of the state court is conclusive, that it is difficult to sort from these propositions the federal question which plaintiff in error attempts to present. It is only these questions that this court has jurisdiction to review.

Mathews v. Zane, 7 Wheat U. S. 164, 5 L. E. 425.

Franklin v. South Carolina, 218 U. S. 161, 54 L. E. 980.

Sylvester v. Washington, 215 U. S. 80, 54 L. E. 101.

As we view the record in this case the only federal question that can be presented, even though this court should hold that the state supreme court had not decided the entire question on non-federal grounds, are the questions dealing with the adjudication of water rights by the state board of irrigation of the state of Nebraska, and this proposition involves the following points of law:

1. Is the statute of the state unconstitutional because it does not in express terms provide that the board shall give notice to the interested parties.
2. Did the rules of the board require such notice and was the notice given?
3. The effect of the parties hereto entering their appearance in the proceedings.

4. Was the board as constituted with its rules providing for appeals to the courts a constitutional tribunal to decide the questions of water rights.

Our discussion will be limited to these points and will follow the same order as that in which our authorities are heretofore given.

II.

It can be constitutionally provided that a tribunal should determine these water rights and require all persons to appear without giving specific notice.

The waters of the state are public property. The state grants the right to use these waters under such powers and limitations as it may deem expedient. Prior to the irrigation law of 1895, the statutes of the state of Nebraska had made no provision for a state wide adjudication and determination of water rights and their priorities. By the statutes of 1895, the legislature of the state of Nebraska, established a tribunal before whom the parties claiming the rights to appropriations of water were required to appear and assert their claims. The legislature could have constitutionally simply provided that all parties should appear within a certain time and show their claims or be barred.

Bottliler v. Dominguez, 130 U. S. 238, 32 L. E. 926. In that case this court held that the United States could constitutionally establish a tribunal before whom all persons claiming land in California by virtue of any Spanish or Mexican land grant were required to appear and establish their claims. This court in discussing the question of notice, says:

"Nor can it be said that there is anything unjust or oppressive in requiring the owner of a valid claim, in that vast wilderness of lands unclaimed, and unjustly claimed, to present his demand to a tribunal possessing all the elements of judicial functions, with a guaranty of judicial proceedings, so that his title could be established if it was found to be valid, or rejected if it was invalid.

"We are unable to see any injustice, any want of constitutional power, or any violation of the treaty, in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons. Every person owning land or other property is at all times liable to be called into a court of justice to contest his title to it. This may be done by another individual, or by the government under which he lives. It is a necessary part of a free government, in which all are equally subject to the laws, that whoever asserts rights or exercises powers over property may be called before the proper tribunals to sustain them.

"No doubt could exist, and none whatever would have been suggested, if this statute, instead of requiring the individual claimants to take notice that they were called upon to establish their title and to come forward and do so, had provided that the United States should sue everybody who was found in possession of any land in California at the time the treaty was made, and thus compel him to produce his title, if he had any. Such suits would have been sustained without hesitation, as being legal, constitutional and according to right. What difference can it make, then, that the party who is supposed to possess all the evidences which exist to support his claim is called upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended, and better calculated to save time and expense, both to the government and to the party, and to arrive at safe and satisfactory conclusions."

To the same effect also are *Barker v. Harvey*, 181 U. S. 481, 45 L. E. 963.

Fort Lyon Canal Co. v. Ark. Valley S. B. & I. L. Co., Colo. 90 Pac. 1023.

It is thus seen that even though plaintiffs in error were correct in their contention that the statute required no notice, still the statute would be constitutional.

III.

Where the statute does not specifically require a notice, the right to have notice given is implied and the statute is

constitutional. The statute of 1895, provided section 16, chapter 69, Session Laws, Nebraska, 1895:

"The method of determining the priority of amount of appropriation shall be determined by said state board, which at its first meeting shall designate the streams to be first adjudicated."

Acting pursuant to this statute of authority, adopted certain rules appearing on pages 251 and 252 of the printed record. Rule 14 of the state board provided that the secretary should establish such minor rules and regulations governing the conduct of said board as he may deem necessary and pursuant to this authority the secretary of the board established 16 certain rules appearing on pages 252 to 254 of the printed record and these rules were thereafter duly adopted by the state board of irrigation. Stipulation page 254, printed record. Rule 12 appearing on page 252, providing for notice as follows:

"The secretary of this board shall mail to the post-office address of each claimant of record at least ten days before the date of first hearing announced, a copy of this resolution, together with a notice of the dates and places of hearing to be held within the water shed to be adjudicated."

It seems well established that where it is necessary to the constitutionality of the statute that notice be given and the statute remains silent on that point, it is implied that notice shall be given. This proposition is sustained by the authority cited under proposition 3 of the authorities and is the construction that the supreme court of the state of Nebraska, has given this statute and it is therefore binding on this court.

IV.

Notice was in fact given. Pursuant to the above rules notice was given to all the plaintiffs in error, save and except the Gering Irrigation district and the Steamboat Ditch company. See printed record, page 255, stipulation; reply of plaintiffs in error, printed record, page 144.

This notice gave notice to all parties interested that there would be an adjudication of the right to use water claimed prior to April 4th, 1895, within the water shed of the North Platte and Platte rivers and designated specifically where said hearings would be held for each county. Pursuant to this notice all the parties, save and except the two companies hereinbefore mentioned, appeared and made proof of their claims. This notice gave each of them specific notice that the water rights on the North Platte river were to be adjudicated at that time. The rules of the state board of irrigation, rules 1 to 12, printed record, 252 to 253, gave each and all of them the right to contest the claims of the defendants in error, yet not one of them filed any protest or contest thereto. This being the case, the state board then proceeded to adjudicate the rights of this defendant in error the same as it adjudicated the rights of all other parties upon proof presented by defendant in error.

This gave all the parties ample opportunity to appear and be heard. Any or all of them could have contested the right of defendant in error. The rules provided for application for formal hearing before the board and appeal from the decision of the board to the courts. None of the parties are in a position to complain because no notice of the action taken on the application of defendant in error was given them. None of them had contested its claim and the state board had a right to rely on that fact as an indication they were content therewith.

V.

The appearance of the parties to participate in the adjudication was a waiver of all and any defects in the statute as to notice and in the actual giving of notice.

Each and all of the plaintiffs in error, save and except the two hereinbefore specifically mentioned, appeared in the proceedings to adjudicate the priority before the state board of irrigation in the same proceeding in which this defendant in

error appeared. That this constituted a general appearance and that the parties cannot now complain of any lack of notice cannot be doubted. The authority cited under paragraph 5 of the points of law relied on, amply sustains this position.

We do not understand that plaintiffs in error contend that the legislature could not constitutionally delegate to a tribunal such as the state board of irrigation the right to adjudicate these water rights. If such contention is made it is fully disposed of by the authority cited under paragraph 6 of the points and authorities of law relied on, the same being the authority that the supreme court of the state of Nebraska cites in its opinion sustaining its position. This is especially true when it is remembered that a final right of appeal was given to the court from the decisions of the state board of irrigation, so that any party appearing had the privilege of having his right finally adjudicated in a court of law.

CONCLUSION.

We are so firmly of the opinion that the decision of this case by the supreme court of the state of Nebraska on a non-federal question precludes a review of that judgment by this court that we have not perhaps given as much attention as may seem proper in a case of this importance to the constitutional question which the plaintiffs in error attempted to raise.

We think we have, however, gone far enough to conclusively show that the state board of irrigation of the state of Nebraska is a constitutional tribunal, clothed with full power to make adjudications as to priority of appropriations of water; that such adjudications when unappealed from are valid and binding.

If this is not the case very grave consequences will result. The title in standing of every water right in the state of Nebraska, will be unsettled and the whole question of irrigation and water rights in the state left in a state of chaos.

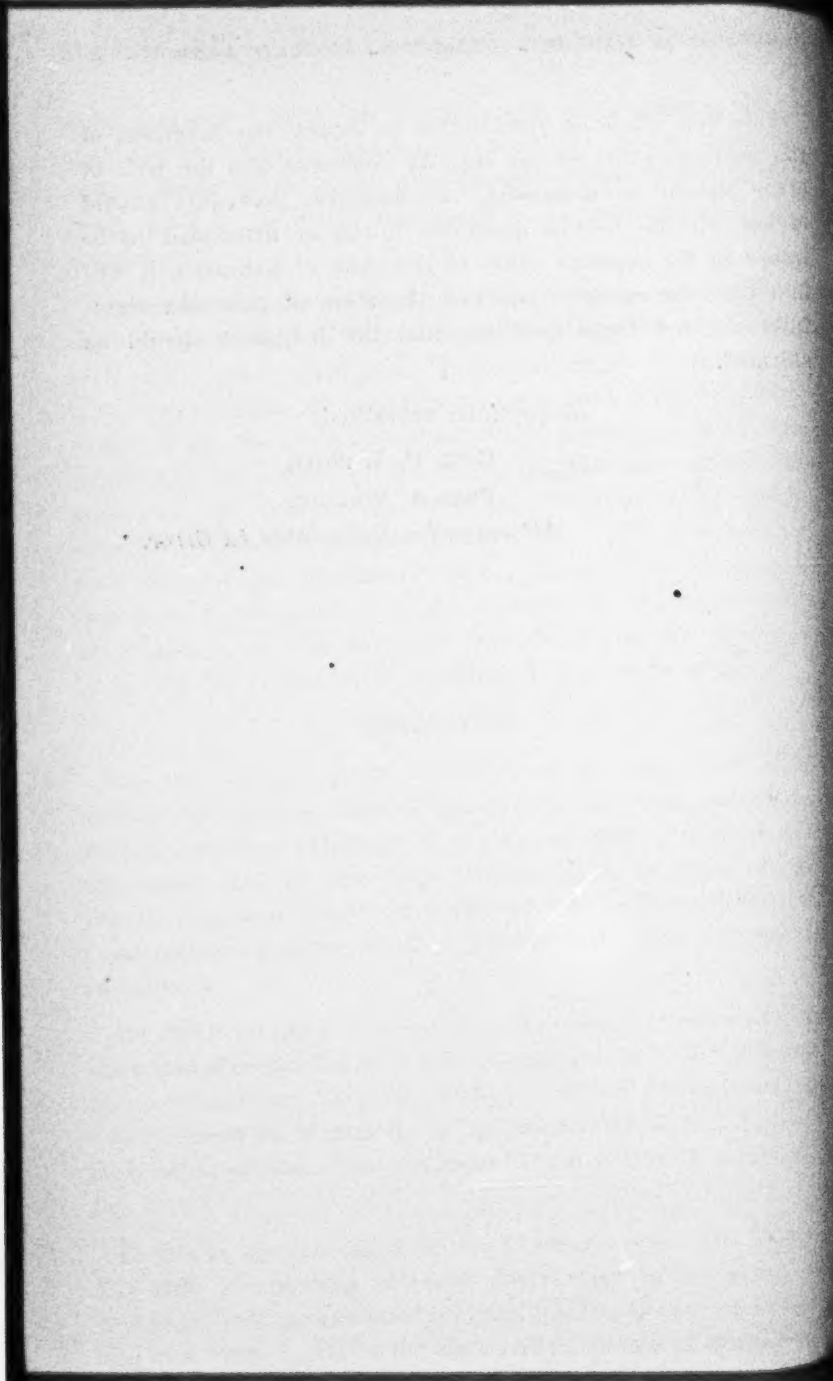
This court has no jurisdiction to review the judgment of the supreme court of the state of Nebraska and the writ of error should be dismissed. If, however, the court should review all the federal questions raised or attempted to be raised in the supreme court of the state of Nebraska, it will find that the supreme court of the state of Nebraska rightfully decided these questions and the judgment should be affirmed.

Respectfully submitted,

CARL C. WRIGHT,

FRED A. WRIGHT,

Attorneys for Defendants In Error.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1916.

No. 46.

ENTERPRISE IRRIGATION DISTRICT, ET AL.

vs.

TRI-STATE LAND COMPANY, ET AL.

Appealed from Supreme Court of Nebraska.

**SUPPLEMENTAL BRIEF FOR DEFENDANTS
IN ERROR.**

This case appears to have been filed in the District Court for Scotts Bluff County, Nebraska, sometime in the year 1909. A demurrer to the petition was entered and sustained, which was followed by amended petitions, upon which the case was tried.

This case differs from the case of *Pacific Livestock Co. vs. Lewis, et al*, 241 U. S., 440, appealed from the State of Oregon, and the later case of *O'Neill vs. Northern Colorado Irrigation Co.*, 242 U. S., 20, from Colorado, in one particular. Each of the two last-named cases were contested largely on the theory that having been brought before certain State boards, due process of law was not had.

In the Oregon case the suit was brought in the first instance before what is termed a "board of control," consisting of the State engineer and two commissioners, who hear all the evidence and file their findings of fact, conclusions of law, and recommended decree, with the Circuit Court. Under the law, if no exceptions are taken to these findings within a specified period, the court is authorized to enter a decree thereon, just as trial judges for nearly fifty years were authorized to do under the practice with regard to findings of fact and conclusions of law of a referee in a suit in equity.

In the O'Neill case the suit was brought in similar manner. In each of these cases certain notices were given by publication and by registered letter. These cases were contested through the courts, and by this honorable court in each instance held not to be in violation of the 14th Amendment of the Federal Constitution. It would seem that these cases, independent of the point whether the case with which we are confronted is appealable, should be conclusive as to the one here under consideration.

However, the case now before the court has fewer pegs on which to stand, when examined with a legal microscope, than the other cases named. This is because of the fact that the suit was brought in the *District Court*

of Scotts Bluff County, Nebraska, without having first gone through the hands of a board or quasi-court, such as the Pacific Livestock Co. case and the O'Neill case, the constitutionality of which has already been upheld, had to pass through. It would seem therefore that in view of these other cases and final conclusions reached therein, there is but little left for argument here.

But we are told that sometime in the "recent prehistoric" past there were proceedings had between the various ditch companies which passed through similar legal conduits to those through which the Oregon and Colorado cases traveled; that after a time—and quite a long time—the parties here complaining being dissatisfied therewith and having doubts about the proceedings, selected what they in their imagined wisdom deemed the proper tribunal, that is, the district court—a court of unquestioned jurisdiction. The case was there tried. The findings of the former proceedings were introduced in evidence. The testimony was given pro and con, and all parties complaining here submitted to the jurisdiction of the District Court of Scotts Bluff County and produced such evidence as they had in hand. That testimony, with that submitted in the way of record evidence such as findings of the State board, which it is practically conceded had fully tried out and considered all the facts involved, appears to have been submitted to the trial court whose jurisdiction stands unquestioned. This trial court reached a conclusion not satisfactory to the defendants in error here, who appealed to the Supreme Court of Nebraska. The Supreme Court of Nebraska, which, like practically all the State Supreme Courts in the West, tries equity suits *de novo*, found on the facts of record in favor of the defendants in error here. Hence this appeal.

It is here strongly argued that the decision of the Nebraska Supreme Court takes property from plaintiffs in error without "due process of law." That feature, however, appears to be fully answered by the holding in the case of *Twining vs. New Jersey*, 211 U. S., 47, to the effect that the "law of the land" means the law of the State as construed by the highest judicial tribunal of the particular State in which such case may arise, so long as the court under the well established and recognized practice of such State may have jurisdiction of the parties to the suit and the property involved therein. In that case the question as to how evidence might be introduced was the principal point. Most States have provisions that no man shall be required to testify against himself. It was held, by all except one member of the court, that notwithstanding the court instructed the jury that the defendant's failure to testify might be considered as circumstantial evidence against the defendant, that since the State Supreme Court had upheld such practice and since it was recognized as the law of the State, the Supreme Court of the United States would not review the decision, and that in so holding the defendant would not be deprived of the rights guaranteed under the 14th Amendment.

This is supplemented by the statement in *American Land Co. vs. Zeiss*, 219 U. S., 71, to the effect that "due process requires that the court which assumes to determine the rights of parties shall have jurisdiction and that there shall be notice and opportunity for hearing given the parties. Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has to this time sustained all State laws, statutory

or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.✓

Now in the case here presented much is said about getting jurisdiction by notice, etc. We observe quoted in the brief of plaintiffs in error references in the State laws to the different departments of State government. Passing by the well-settled rule that each State has authority through its highest courts to pass upon the procedure under which these various departments must act, these quotations seem immaterial so far as may concern the defendants in error in this case. And why? The response is not difficult. In this case, in the outset, it must necessarily be conceded that the District Court is one of the courts in which proceedings of this nature may be had. The question here raised appears to go only to the manner of introducing *evidence* and *procedure* by which the State court may be governed.

We will concede that if no evidence whatever is introduced or offered by which to determine the relative rights of the parties to property, and it should happen, which seldom does happen, that the court without any evidence upon which to base its findings should find for A as against B and this fact should appear of record, such total want of evidence would be a violation of the 14th Amendment and constitute a deprivation of property without due process of law. But, as it here appears, it is merely a question of *procedure* as to *how* this evidence may be procured, whether by introducing affidavits, applications for notice of water rights, publication of notice of contests, hearings had thereon, and so on *ad infinitum*, or by filing the findings of a State board. Whereas in this case it finally develops that the case winds up in a

court of unquestioned jurisdiction, and the court, after considering all the evidence, reaches a conclusion based upon the facts, then the same are not questionable on appeal. Attention is called to the cases cited in 1 Encyc., U. S. Reports, 774. In *Jenkins vs. Neff*, 186 U. S., 235, the following language is used:

"We apply the law to the facts settled in the State courts and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion."

Congress has provided that the final judgment of the highest court of a State, of which this court may take cognizance, may be re-examined upon writ of error, which is a process of common-law origin, and removes nothing for re-examination but questions of law arising upon the record. *Egan vs. Hart*, 165 U. S., 188; *Chicago R. Co. vs. Chicago*, 166 U. S., 226.

Findings of Fact Binding Upon This Court.

The finding of facts made in the highest court of a State is binding upon the Supreme Court of the United States, and will be the basis of decision there.

Adams vs. Church, 193 U. S., 510; *Egan vs. Hart*, 165 U. S., 188.

In chancery cases the rule is the same.

Not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a State court in a suit in equity, as

in a case at law, when the facts are found by the court below, this court is concluded by such finding.

Encyc. of U. S. Reports, Vol. 1, p. 781.

Egan vs. Hart, 165 U. S., 188, 189; 41 L. Ed., 680.

Bement vs. Nat. Harrow Co., 186 U. S., 70, 83; 46 L. Ed., 1058.

Dower vs. Richards, 151 U. S., 658, 666; 38 L. Ed., 305.

"It is well settled that the findings of fact in the State courts are, on a writ of error, conclusive with us."—*Jenkins vs. Neff*, 186 U. S., 230, 235.

"No point has been more repeatedly and authoritatively settled than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record."—Encyc. of U. S. Reports, Vol. 1, p. 1005, and cases cited in note.

A finding of court is entitled to the same weight as a verdict of a jury, and is conclusive, on appeal, unless plainly against the evidence.—*Cliff vs. United States*, 195 U. S., 159.

The existent facts in the case now before this honorable court are stated, and clearly stated, by the Supreme Court of Nebraska in its opinion, and it is needless to cite authorities in support of the proposition that statements of fact of the highest court of a State from which an appeal may be taken are not reviewable upon appeal here.

Then what have we left for consideration. We have but one question, and that is whether the holding of the

State court in view of the evidence presented and pleadings before it, to the effect that plaintiffs in error here stood by while the defendants in error here expended about two and a half million dollars and raised no question as to their rights until after this expenditure was made, constituted an estoppel. Through a mere inadvertence this is referred to in the brief of defendants in error here in a manner which might be construed as meaning \$2,500 or \$250,000, instead of \$2,500,000. However, plaintiffs in error have been fair enough to so state it in their brief, page 21, as to disclose the real facts, namely, that \$2,500,000 was expended.

The question of estoppel is in itself clearly a question of practice, of which State courts have exclusive jurisdiction. We are told by plaintiffs in error in their brief that estoppel was not pleaded, but in this they are inconsistent. See page 69 of their brief where they state facts sufficient to constitute estoppel. On page 67 of their brief they quote a statement of facts from the opinion of the Supreme Court of Nebraska, disclosing that our contention to the effect that estoppel was pleaded is beyond question. Under the decisions of this honorable court, this statement of facts must be taken as conclusive.

True: we do not designate in so many words that plaintiffs in error are "estopped." Nor is this necessary. It might have been more formal to have said "plaintiffs should not be permitted to allege for the reason that" (stating the facts), but this is not essential when the facts themselves are pleaded. The *form* must give way to the *substance* in equity cases. That feature is too well settled to admit of discussion. To put a "brand" on the pleading and say "This is a plea of estoppel" makes it no

more so than if the facts are stated and established, as appears practically to be admitted in this case. The State court has recognized that system of pleading, and it is clearly a question of practice, not reviewable here.

Taking into consideration all these features, there appears nothing left for further consideration. Hence we believe the decision of the Supreme Court of Nebraska should be affirmed.

Respectfully submitted,

A handwritten signature in cursive script, reading "Will R. King". The signature is written in dark ink and is positioned above a horizontal line.

Of Counsel for Defendant in Error.

Address: Farragut Apartments, Washington, D. C.

ENTERPRISE IRRIGATION DISTRICT ET AL. v.
FARMERS MUTUAL CANAL COMPANY ET AL.

ERROR TO THE SUPREME COURT OF THE STATE OF
NEBRASKA.

No. 48. Argued January 22, 23, 1917.—Decided March 6, 1917.

In a suit to determine the relative rights of the parties to divert water for irrigation from a stream in Nebraska, the state court decided that superiority of the defendant's appropriation had been conclusively established against the plaintiff, consistently with due process, in proceedings before a state board, and, further and independently, that the plaintiff, having without objection stood by and permitted the defendant to go to enormous expense in the construction of a canal and diverting works, was estopped to question the validity of the defendant's appropriation on which it relied. The ground of estoppel being distinct, non-federal, and fairly supported by the facts, *Held*, that this court had no jurisdiction to review, although the state board's adjudication was challenged under the Fourteenth Amendment.

When the judgment of a state court is placed upon two grounds, one involving a federal question and the other not, the jurisdiction of this court depends upon whether the non-federal ground is independent of the federal ground and also broad enough to sustain the judgment; if so, the judgment does not depend upon the decision of any federal question, and this court has no power to disturb it.

Where the non-federal is so interwoven with the federal ground as not to be independent, or, standing alone, is not of sufficient breadth to sustain the judgment, the jurisdiction of this court attaches.

Where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question, the judgment rests upon the latter and may be reviewed here.

But, where the non-federal ground has fair support, this court may not inquire whether the decision upon it is right or wrong.

Questions of state law do not engage the due process clause of the Fourteenth Amendment.

Writ of error to review 92 Nebraska, 121, dismissed.

THE case is stated in the opinion.

Mr. Harry N. Haynes, with whom *Mr. Thomas M. Morrow*, *Mr. William Morrow* and *Mr. Harold D. Roberts* were on the brief, for plaintiffs in error.

Mr. Fred A. Wright and *Mr. Will R. King*, with whom *Mr. Carl C. Wright* was on the briefs, for defendants in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

In form this was a suit to determine the relative rights of the parties to divert the waters of the North Platte River, in western Nebraska, for purposes of irrigation, but the only controversy disclosed was over the extent and priority of the right of the Farmers Mutual Canal Company, the principal defendant. Another defendant, the Tri-State Land Company, was interested as a stockholder of the canal company, and need be noticed only in another relation.

The canal company claimed a right to divert through its canal $1,142\frac{6}{7}$ cubic feet of water per second of time—usually spoken of as second feet—under an appropriation dating from September 16, 1887, and the other parties severally claimed rights to divert specific amounts under later appropriations. In so far as the canal company's claim exceeded 28 second feet with a priority dating from September 16, 1887, it was challenged on the grounds that the appropriation upon which it rested had not been perfected with reasonable diligence; that this was the situation when the appropriations under which the others were claiming were made and perfected; that if the claim subsequently was enlarged it could not as to the enlargement take priority over the intervening rights of others, and that if it originally covered $1,142\frac{6}{7}$ second feet, which was disputed, all right to more than 28 feet had

been lost by non-user. But the canal company asserted the validity of its entire claim, denied any loss by lack of diligence or non-user, and contended, among other things, that the State Board of Irrigation had sustained its entire claim in 1897 when the board was engaged under the state law (Laws 1895, c. 69, §§ 16-27) in adjudicating claims to the waters of the North Platte River, and that the other parties were estopped from questioning its right by reason of their attitude and conduct after 1904 when its predecessor in interest was completing the canal and diverting works at enormous cost. The other parties denied that there was any ground for an estoppel and insisted that, consistently with the due process and equal protection provisions of the Fourteenth Amendment, the claimed adjudication by the State Board of Irrigation could not be treated as in any way binding upon them, because (a) the law under which the board acted made no provision for notice and (b) the board had proceeded without notice and without affording an opportunity to be heard. Other contentions were advanced, but no purpose would be served by stating them here.

It was conceded that during portions of the irrigation season the flow of the stream had not been sufficient to satisfy all of these claims and that the State Board of Irrigation recently had recognized the canal company's claim by refusing to restrict its diversion in time of low water to less than $1,142\frac{6}{7}$ second feet.

The cause was submitted on the pleadings and on a "stipulation of facts" covering 84 printed pages and containing much that was purely evidential and not in the nature of a statement of ultimate facts.

The stipulation disclosed that the canal company's canal was about 80 miles in length, was completed in October, 1910, and was capable of irrigating 80,000 acres; that in 1895 it had cost about \$100,000 and was capable of irrigating 30,000 acres; that by reason of financial diffi-

culties, a foreclosure suit and other litigation the work of construction was practically suspended from 1895 to 1905; that the work was actively resumed in 1905 and continued with vigor until October, 1910, when it was completed; that the cost of the work from 1905 to 1910 was in excess of \$1,500,000, and more than \$950,000 of this was expended before August, 1909, when this suit was begun; that the work done after 1905 included a needle-dam across the river costing \$27,869.20, an additional head-gate of concrete and reinforced steel costing \$52,113.20, and a waste-gate or spillway of similar construction costing \$42,253.46; and that the number of acres actually reclaimed and irrigated by the canal was being rapidly increased, being less than 2,000 acres in 1905 and 20,000 acres in 1910.

The trial court held that the canal company's right, although prior in time, did not extend to more than 28.57 second feet of the water, and entered a decree to that effect. An injunction was also granted restraining the company from taking more than was thus accorded to it. In the Supreme Court the decree was reversed and the suit was dismissed on the merits so far as it concerned the canal company and the Tri-State Land Company, and without prejudice in respect of any controversy between the other parties. 92 Nebraska, 121.

The Supreme Court, recognizing that the case was of great importance to the parties and to all who were interested in irrigated lands in the State, and that any decision therein would almost inevitably result in serious loss to one or more of the parties, proceeded in a painstaking way to state, discuss and determine all the questions presented. Among other things, it sustained the authority of the State Board of Irrigation under the Act of 1895 to adjudicate claims like those to the waters of the North Platte River; described the board's power in that regard as quasi-judicial and its adjudications as final un-

less appealed from to the district court; held that the right to due notice and a reasonable opportunity to be heard was implied in the act; and reaffirmed its decision in *Farmers Canal Co. v. Frank*, 72 Nebraska, 136, made in 1904, that the board's action upon the canal company's claim amounted to an unconditional adjudication of the extent and priority of the claim and that a leading purpose of the Act of 1895 was to create a state board "whose records would evidence the priorities of title to the appropriation of water in such a public manner that no one might be misled."

As respects the notice actually given to the other parties, the opportunity which they had for opposing or contesting the canal company's claim before the board, and the knowledge of the board's action which they reasonably should be regarded as possessing, the court found, in substance, that before the board began to inquire into the claims to the waters of the North Platte it gave due notice of its purpose so to do; that under that notice all the parties to this suit, or their predecessors in interest, appeared before the secretary of the board, at the times and places indicated in the notice, and presented such evidence as they deemed appropriate in support of their respective claims—the evidence being preserved and becoming a part of the record in that proceeding; that the board's printed rules, which were duly brought to the attention of all the parties, permitted any claimant to contest the claim of another, but no one sought to contest the canal company's claim; that in ordinary course, after the evidence was presented, the claims were adjudicated—a separate opinion upon each claim being prepared by the secretary, who was the State Engineer, and afterwards adopted by the board; that each claimant was specially notified of the decision upon his own claim, but not of the decisions upon the claims of others; that the decision upon the canal company's claim, in addition to being en-

tered in the records of the state board, was shown in a list of established claims regularly appearing in the biennial reports of the board which the State required to be made and published, and was recorded in 1905 in the office of the county clerk of the county where the appropriation was made.

In these circumstances the court concluded that the contention that the board had proceeded without adequate notice to the parties, or without affording them a reasonable opportunity to be heard, had no real foundation. It also concluded that, in view of the nature of the enterprise, the large expenditures required and the circumstances surrounding the temporary suspension of the work, the contention that part of the canal company's claim had been lost through lack of diligence or non-user was highly inequitable and untenable.

Then coming to the question of estoppel the court held that, even if the other questions were decided against the canal company, it was entitled to prevail upon the ground that its adversaries were estopped by reason of their own conduct. In the course of its opinion the court referred at length to the admissions in the pleadings and stipulation and found, as matter of fact, that shortly after the decision in *Farmers Canal Co. v. Frank*, *supra*, the Tri-State Land Company, the canal company's immediate predecessor in interest, actively took up the work of completing the canal and diverting works and proceeded therewith in good faith and with vigor, relying upon that decision and the state board's adjudication and openly claiming the amount of water and priority specified in the latter, and that the other parties, with knowledge of that claim and situation, made no claim of superior right to the water, but remained silent for four years while the work, which the court described "as comparable only to the construction of a railroad," was being carried to completion at enormous cost and the water was being

diverted and used through the canal in increasing volume. And, having thus passed upon the questions of fact, the court said:

"Under these circumstances, and having this knowledge, it would be contrary to the plainest principles of equity if plaintiffs might stand silently by, seeing the defendants engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure, and result in the absolute loss of the money expended. It would be manifestly inequitable and unjust to allow the plaintiffs, after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined."

Concisely stated, the assignments of error complain that the Supreme Court infringed the due process and equal protection provisions of the Fourteenth Amendment, first, by giving decisive effect to the state board's decision, instead of holding that it was made without lawful notice or opportunity to be heard and therefore was void, and, second, by misconceiving or misapplying the statute and common law of the State in disposing of other questions.

Our jurisdiction is disputed and must be considered, as, indeed, it should be, even if not challenged. As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection clauses of the Fourteenth Amendment, and another was whether the defense of estoppel *in pais* was well grounded. The first was plainly a federal question and the other as

plainly non-federal. Both were resolved in favor of the canal company. The other questions, none of which was federal, may be put out of view in this connection. Thus we are concerned with a judgment placed upon two grounds, one involving a federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any federal question and we have no power to disturb it. *Hammond v. Johnston*, 142 U. S. 73, 78; *Eustis v. Bolles*, 150 U. S. 361; *Berea College v. Kentucky*, 211 U. S. 45, 53; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 116; *Gaar, Scott & Co. v. Shannon*, 223 U. S. 468; *Southern Pacific Co. v. Schuyler*, 227 U. S. 601, 610. It has been so held in cases where the judgment was rested upon a federal ground and also upon an estoppel. *Pierce v. Somerset Ry.*, 171 U. S. 641, 648; *Lowry v. Silver City Gold & Silver Mining Co.*, 179 U. S. 196.¹ But where the non-federal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. See *Moran v. Horsky*, 178 U. S. 205, 208; *Creswill v. Knights of Pythias*, 225 U. S. 246, 261. And this is true also where the non-federal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary or a mere device to prevent a review of the decision upon the federal question. *Leathe v. Thomas*, 207 U. S. 93, 99; *Vandalia R. R. Co. v. South Bend*, *ibid.*, 359, 367. But, where the non-federal ground has fair support, we are not at liberty to inquire whether it is right or wrong, but must accept it, as we do other state decisions of non-federal questions. *Murdock v. Memphis*, 20 Wall. 590, 635; *Eustis v. Bolles*, *supra*, p. 369;

¹ See also *Sherman v. Grinnell*, 144 U. S. 198, 202; *Gillis v. Stinchfield*, 150 U. S. 658, 660; *Hale v. Lewis*, 181 U. S. 473, 479-480.

Leathe v. Thomas, supra; Arkansas Southern R. R. Co. v. German National Bank, 207 U. S. 270, 275.

It does not, as we think, admit of doubt that the estoppel *in pais* is made an independent ground of the judgment. Instead of being interwoven with the validity of the state board's adjudication, which is the other ground, it is distinct from it, and is so treated in the court's opinion. In taking up the question of estoppel, as also in concluding its discussion of the subject, the court plainly shows that it is then indulging an assumption that the other ground is not tenable. True, the board's proceedings and adjudication are referred to as having some bearing upon the good faith of the canal company and upon the knowledge which the other parties had of that company's claim, but in this the court neither departs from the assumption indulged nor confuses the two grounds of the judgment. Even if invalid, the board's proceedings and adjudication could well have a real bearing upon the matters indicated.

In view of the facts before recited we think it cannot be said that the ruling upon the question of estoppel is without fair support or so unfounded as to be essentially arbitrary or merely a device to prevent a review of the other ground of the judgment. We therefore are not at liberty to inquire whether the ruling is right or wrong. And it may be well to add that the question did not originate with the court. It was presented by the pleadings, was in the minds of the parties when the stipulation was made, and was dealt with by counsel and court as a matter of obvious importance.

It is not urged, nor could it well be, that as a ground of decision the estoppel is not broad enough to sustain the judgment.

The claim that the court in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the State and thereby infringed the due process and equal protection

clauses of the Fourteenth Amendment requires but brief notice. The due process clause does not take up the laws of the several States and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. *Sayward v. Denny*, 158 U. S. 180, 186; *Central Land Co. v. Laidley*, 159 U. S. 103, 112; *Castillo v. McConnico*, 168 U. S. 674, 683-684. The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the State, and the state court's decision of them is controlling. *Preston v. Chicago*, 226 U. S. 447; *St. Louis & Kansas City Land Co. v. Kansas City*, 241 U. S. 419, 427; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116. The reference to the equal protection clause evidently is inadvertent, for there is no claim of unwarranted or arbitrary discrimination.

It results from what has been said that the judgment is one which is not open to review by this court.

Writ of error dismissed.